Nos. 01-950, 01-1018

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In the Supreme Court of the United States

HILLSIDE DAIRY, INC., ET AL.,

Petitioners,

v.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, ET AL.,

Respondents.

PONDEROSA DAIRY, ET AL.,

Petitioners,

v.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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CERTIORARI GRANTED JANUARY 10, 2003

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

97-CV-1179

HILLSIDE DAIRY, INC, ET AL
v.

VENEMAN, ET AL

RELEVANT DOCKET ENTRIES

DATE	#	DOCKET ENTRY
6/26/97	1	COMPLAINT for other statutes, fee status paid, receipt # 179419, assigned to Judge Garland E. Burrell referred to Magistrate Judge John F. Moulds (chl) [Entry date 06/27/97] [2:97cv1179]
6/27/97	5	MOTION for preliminary injunction by plaintiff Motion Hearing Set for 9am on 7/28/97 (gk) [Entry date 07/01/97] [2:97cv1179]
7/14/97	16	BRIEF IN OPPOSITION by defendant to motion for preliminary injunction by plaintiff [5-1] (chl) [Entry date 07/15/97] [2:97cv1179]

DATE	#	DOCKET ENTRY
7/25/97	30	ORDER by Judge Garland E. Burrell ORDERING related case(s) 2:97-cv-1179 with member cases 2:97-cv-1185 (cc: all counsel) (ndd) [Entry date 07/25/97] [2:97cv1179]
8/12/97	40	ORDER by Judge Garland E. Burrell ORDERING pltfs Ponderosa Dairy's reply to dfts' opposition to motion for preliminary injunction, file 7/28/97, the order striking the document is VACATED [31-1], [29-1]; pltfs' motion for preliminary injunction relief is GRANTED in part and DENIED in part; [4-1], [5-1] (cc: all counsel) (ljr) [Entry date 08/12/97] [2:97cv1179 2:97 cv1185]
8/15/97	41	NOTICE OF MOTION AND MOTION to dismiss by defendant Ann Veneman and A J Yates motion TO BE HEARD by Judge Garland E. Burrell; Motion Hearing Set For 9am on 9/22/97 (gk) [Entry date 08/19/97] [2:97cv1179]
4/1/98	71	AMENDED COMPLAINT [1-1] by Hillside Dairy, Inc in 2:97-cv-01179, A&A Dairy, Inc in 2:97-cv-01179, Milky Way Farm, Inc in 2:97-cv-01179 (kdc) [Entry date 04/03/98] [2:97cv1179]

DATE	#	DOCKET ENTRY
4/20/98	73	NOTICE OF MOTION AND MOTION to dismiss amended complaint by defendant Hearing set for 5/18/98 at 9:00am (chl) [Entry date 4/20/98] [2:97cv1179]
6/3/98	84	SECOND AMENDED COM-PLAINT [71-1] by plaintiffs (dd) [Entry date 06/04/98] [2:97cv1179]
8/3/98	96	ORDER by Judge Garland E. Burrell ORDERING motion to dismiss amended complaint by defendant [73-1] GRANTED in 2:97-cv-01179: Plaintiff is granted 20 days to file and serve a second amended complaint (cc: all counsel) (gm) [Entry date 08/03/98] [2:97cv1179 2:97cv1185]
2/8/99	121	STIPULATION AND ORDER by Judge Garland E. Burrell: dft William J Lyons Jr substituted as Secretary of the CA Dept of Food and Ag, party Ann Veneman DISMISSED (cc: all counsel) (dd) [Entry date 02/08/99] [2:97cv1179 2:97cv1185]

DATE	#	DOCKET ENTRY
4/12/99	134	JOINT NOTICE OF MOTION AND JOINT MOTION for summary judgment by plaintiffs in 2:97-cv-01185 and 2:97-cv-012179 motion TO BE HEARD by Judge Garland E. Burrell; motion Hearing Set For 9:00 5/10/99 (dd) [Entry date 04/13/99] [2:97cv1179 2:97cv1185]
4/12/99	150	NOTICE OF MOTION AND MOTION for summary judgment by defendants motion TO BE HEARD by Judge Garland E. Burrell; Motion Hearing Set For 9:00 5/10/99 (dd) [Entry date 04/13/99] [2:97cv1179]
7/22/99	209	ORDER by Judge Garland E. Burrell ORDERING motion for summary judgment by defendants in 2:97-cv-01179 [150-1] and 2:97-cv-01185 [76-1] GRANTED; the Clerk to enter judgment in favor of dft and against pltfs; CASE DISMISSED (cc: all counsel) (dd) [Entry date 07/22/99] [2:97cv1179 2:97cv1185]
8/3/99	210	JUDGMENT entered in favor of dft pursuant to court order issued 7/22/99 by Judge Garland E. Burrell (cc: all counsel) (dd) [Entry date 08/03/99] [2:97cv1179 2:97cv1185]

DATE	#	DOCKET ENTRY
8/12/99	211	NOTICE OF APPEAL by plaintiffs from District Court decision re judgment [210-1] in 2:97-cv-01179 and judgment [172-1] in 2:97-cv-01185 (fee status paid-#193758) (dd) [Entry date 08/13/99] [2:97cv1179 2:97cv1185]
8/23/99	216	NOTICE OF APPEAL by plaintiffs Hillside Dairy, A&A Dairy, L&S Dairy and Milky Way Farms in 2:97-cv-01179 from District Court decision re judgment [210-1] [172-1] (fee status paid) (dd) [Entry date 08/24/99] [2:97cv1179 2:97cv1185]
10/3/01	242	CERTIFIED COPY of judgment from 9th Circuit the decision of the District Court [236-1] is AFFIRMED (cc: all counsel) (kdc) [Entry date 10/05/01] [2:97cv1179]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

97-CV-1185

PONDEROSA DAIRY, ET AL
v.
VENEMAN, ET AL

RELEVANT DOCKET ENTRIES

DATE	#	DOCKET ENTRY
6/26/97	1	COMPLAINT for declaratory and injunctive relief, fee status paid, receipt # 179435, assigned to Honorable Lawrence K. Karlton; referred to Magistrate Judge Gregory G. Hollows (mc) [Entry date 06/27/97] [2:97cv1185]
6/27/97	4	NOTICE OF MOTION AND MOTION for preliminary injunction by plaintiff Ponderosa Dairy motion TO BE HEARD by Honorable Lawrence K Karlton; Motion Hearing Set for 8/4/97 at 9:00am (dmb) [Entry date 06/30/97] [2:97cv1185]

DATE	#	DOCKET ENTRY
7/21/97	18	BRIEF IN OPPOSITION (RESPONSE) by dfts Ann M Veneman, A J Yates to motion for preliminary injunction by plaintiff Ponderosa Dairy [4-1] (bb) [Entry date 07/22/97] [2:97cv1185]
7/25/97	23	RELATED CASE ORDER by Judge Garland E. Burrell ORDERING related case(s) 2:97cv1179 with member of case 2:97cv1185 reassigned to Judge Garland E. Burrell; motion for preliminary injunction by plaintiff Ponderosa Dairy TO BE HEARD by Judge Garland E. Burrell; Case 2:97cv1185 referred to Magistrate Judge John F. Moulds; Clerk to make appropriate adjustment in the assignment of civil caes to compensate for this reassignment (cc: all counsel) (ndd) [Entry date 07/25/97] [2:97cv1185]

DATE	#	DOCKET ENTRY
8/12/97	35	ORDER by Judge Garland E. Burrell ORDERING pltfs Ponderosa Dairy's reply to dfts' opposition to motion for preliminary injunction, file 7/28/97, the order striking the document is VACATED [31-1], [29-1]; pltfs' motion for preliminary injunction relief is GRANTED in part and DENIED in part; [4-1], [5-1] (cc: all counsel) (ljr) [Entry date 08/12/97] [2:97cv1179 2:97cv1185]
8/15/97	38	NOTICE OF MOTION AND MOTION to dismiss by dfts Ann M Veneman in 2:97-cv-01185, A J Yates in 2:97-cv-01185 ; Motion Hearing Set For (bb) [Entry date 08/18/97] [2:97cv1185]
3/31/98	52	AMENDED COMPLAINT [1-1] by plaintiffs (dmb) [Entry date 04/03/98] [2:97cv1185]
4/16/98	54	NOTICE OF MOTION AND MOTION to dismiss amended complaint by defendant in 2:97-cv-01185 Motion Hearing Set for 5/18/98 at 9:00am (chl) [Entry date 04/17/98] [2:97cv1185]

DATE	#	DOCKET ENTRY
8/3/98	66	ORDER by Judge Garland E. Burrell ORDERING motion to dismiss amended complaint by defendant [73-1] GRANTED in 2:97-cv-01179: Plaintiff is granted 20 days to file and serve a second amended complaint (cc: all counsel) (gm) [Entry date 08/03/98] [2:97cv1179 2:97cv1185]
12/7/98	76	MOTION for summary judgment by defendant Ann M Veneman in 2:97-cv-01185 motion TO BE HEARD by Judge Garland E. Burrell ; Motion Hearing Set For 1/19/99 at 9:00 (supporting documents filed under seal) (gm) [Entry date 12/08/98] [2:97cv1185]
2/8/99	95	STIPULATION AND ORDER by Judge Garland E. Burrell: dft William J Lyons Jr substituted as Secretary of the CA Dept of Food and Ag, party Ann Veneman DISMISSED (cc: all counsel) (dd) [Entry date 02/08/99] [2:97cv1179 2:97cv1185]

DATE	#	DOCKET ENTRY
4/12/99	111	JOINT NOTICE OF MOTION AND JOINT MOTION for summary judgment by plaintiffs in 2:97-cv-01185 and 2:97-cv-012179 motion TO BE HEARD by Judge Garland E. Burrell; motion Hearing Set For 9:00 5/10/99 (dd) [Entry date 04/13/99] [2:97cv1179 2:97cv1185]
4/12/99	130	NOTICE OF MOTION AND MOTION for summary judgment by defendants motion TO BE HEARD by Judge Garland E. Burrell, Motion Hearing Set For 9:00 5/10/99 (dd) [Entry date 04/13/99] [2:97cv1185]
7/22/99	171	ORDER by Judge Garland E. Burrell ORDERING motion for summary judgment by defendants in 2:97-cv-01179 [150-1] and 2:97-cv-01185 [76-1] GRANTED; the Clerk to enter judgment in favor of dft and against pltfs; CASE DISMISSED (cc: all counsel) (dd) [Entry date 07/22/99] [2:97cv1179 2:97cv1185]
8/3/99	172	JUDGMENT entered in favor of dft pursuant to court order issued 7/22/99 by Judge Garland E. Burrell (cc: all counsel) (dd) [Entry date 08/03/99] [2:97cv1179 2:97cv1185]

DATE	#	DOCKET ENTRY
8/12/99	173	NOTICE OF APPEAL by plaintiffs from District Court decision re judgment [210-1] in 2:97-cv-01179 and judgment [172-1] in 2:97-cv-01185 (fee status paid-#193758) (dd) [Entry date 08/13/99] [2:97cv1179 2:97cv1185]
8/23/99	178	NOTICE OF APPEAL by plaintiffs Hillside Dairy, A&A Dairy, L&S Dairy and Milky Way Farms in 2:97-cv-01179 from District Court decision re judgment [210-1] [172-1] (fee status paid) (dd) [Entry date 08/24/99] [2:97cv1179 2:97cv1185]
10/5/01	199	CERTIFIED COPY of judgment from 9th Circuit AFFIRMING the decision of the District Court (cc: all counsel) (kdc) [Entry date 10/05/01] [2:97cv1185]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 99-16981

PONDEROSA DAIRY, ET AL
v.
YATES, ET AL, ET AL

Appeal from: Eastern District of California (Sacramento)

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
5/15/01	ARGUED AND SUBMITTED TO Joseph T. SNEED, Barry G. SILVERMAN, John W. Sedwick [99-16981, 99-16982] (sm) [99-16981 99-16982]
8/9/01	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Joseph T. SNEED; Barry G. SILVERMAN; John W. Sedwick, author) FILED AND ENTERED JUDGMENT [99-16981, 99-16982] (jr) [99-16981 99-16982]

9/24/01	Filed order (Joseph T. SNEED, Barry G. SILVERMAN & John W. Sedwick).....The petition for rehearing and the peition for rehearing enbanc are denied. [4240210-1] in 99-16981, 99-16982 [99-16981, 99-16982] (jr) [99-16981 99-16982]
10/2/01	MANDATE ISSUED [99-16981, 99-16982] (jr) [99-16981 99-16982]
1/18/02	Rec'd ntc from Supreme Court; petition for certiorari filed. Supreme Court No. 01-1018. Filed on 12/26/01 & on dkt 1/11/02. [99-16981, 99-16982] (jr) [99-16981 99-16982]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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1/18/02	Rec'd ntc from Supreme Court; petition for certiorari filed. Supreme Court No. 01-1018. Filed on 12/26/01 & on dkt 1/11/02. [99-16981, 99-16982] (jr) [99-16981 99-16982]

STATUTORY PROVISIONS

Section 143 of the Federal Agricultural Improvement and Reform Act of 1996 (1996 Farm Bill), Pub. L. No. 104-127, 110 Stat. 888, 915-917 (codified at 7 U.S.C. §§ 7253), provides:

SEC. 143. CONSOLIDATION AND REFORM OF FEDERAL MILK MARKETING ORDERS.

(a) AMENDMENT OF ORDERS—

(1) REQUIRED CONSOLIDATION.—The Secretary shall amend Federal milk marketing orders issued under section 8c of the Agricultural Adjustment Act (7 U.S.C. 608c), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937, to limit the number of Federal milk marketing orders to not less than 10 and not more than 14 orders.

(2) INCLUSION OF CALIFORNIA AS SEPARATE ORDER.—Upon the petition and approval of California dairy producers in the manner provided in section 8c of the Agricultural Adjustment Act (7 U.S.C. 608c), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937, the Secretary shall designate the State of California as a separate Federal milk marketing order. The order covering California shall have the right to reblend and distribute order receipts to recognize quota value.

(3) RELATED ISSUES ADDRESSED IN CONSOLIDATION.—Among the issues the Secretary is authorized to implement as part of the consolidation of Federal milk marketing orders are the following:

(A) The use of utilization rates and multiple basing points for the pricing of fluid milk.

(B) The use of uniform multiple component pricing when developing 1 or more basic formula prices for manufacturing milk.

(4) EFFECT OF EXISTING LAW.—In implementing the consolidation of Federal milk marketing orders and related reforms under this subsection, the Secretary may not consider, or base any decision on, the table contained in section 8c(5)(A) of the Agricultural Adjustment Act (7 U.S.C. 608c(5)(A)), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937, as added by section 131 of the Food Security Act of 1985.

(b) EXPEDITED PROCESS.—

(1) USE OF INFORMAL RULEMAKING.—To implement the consolidation of Federal milk marketing orders and related reforms under subsection (a), the Secretary shall use the notice and comment procedures provided in section 553 of title 5, United States Code.

(2) TIME LIMITATIONS.—

(A) PROPOSED AMENDMENTS.—The Secretary shall announce the proposed amendments to be made under subsection (a) not later than 2 years after the date of enactment of this title.

(B) FINAL AMENDMENTS.—The Secretary shall implement the amendments not later than 3 years after the date of enactment of this title.

(3) EFFECT OF COURT ORDER.—The actions authorized by this subsection are intended to ensure the timely publication and implementation of new and amended Federal milk marketing orders. In the event that the Secretary is enjoined or otherwise restrained by a court order from publishing or implementing the consolidation and related reforms under subsection (a), the length of time for which that injunction or other restraining order is effective shall be added to the time limitations specified in paragraph (2) thereby extending those time limitations by a period of time equal to the period of time for which the injunction or other restraining order is effective.

(c) FAILURE TO TIMELY CONSOLIDATE ORDERS.—If the Secretary fails to implement the consolidation required under subsection (a)(1) within the time period required under subsection (b)(2)(B) (plus any additional period provided under subsection (b)(3)), the Secretary may not assess or collect assessments from milk producers or handlers under such section 8c for marketing order administration and services provided under such section after the end of that period until the consolidation is completed. The Secretary may not reduce the level of services provided under the section on account of the prohibition against assessments, but shall rather cover the cost of marketing order administration and services through funds available for the Agricultural Marketing Service of the Department.

(d) REPORT REGARDING FURTHER REFORMS.—

(1) REPORT REQUIRED.—Not later than April 1, 1997, the Secretary shall submit to Congress a report—

(A) reviewing the Federal milk marketing order system established pursuant to section 8c of the Agricultural Adjustment Act (7 U.S.C. 608c),

reenacted with amendments by the Agricultural Marketing Agreement Act of 1937, in light of the reforms required by subsection (a);

(B) describing the efforts underway and the progress made in implementing the reforms required by subsection (a); and

(c) containing such recommendations as the Secretary considers appropriate for further improvements and reforms to the Federal milk marketing order system.

(2) EFFECT OF OTHER LAWS.—Any limitation imposed by Act of Congress on the conduct or completion of reports to Congress shall not apply to the report required under this section, unless the limitation specifically refers to this section.

Section 144 of the Federal Agricultural Improvement and Reform Act of 1996 (1996 Farm Bill), Pub. L. No. 104-127, 110 Stat. 888, 917 (codified at 7 U.S.C. §§ 7254), provides:

SEC. 144. EFFECT ON FLUID MILK STANDARDS IN STATE OF CALIFORNIA.

Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding—

(1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or

(2) the labeling of such fluid milk products with regard to milk solids or solids not fat.

Section 145 of the Federal Agricultural Improvement and Reform Act of 1996 (1996 Farm Bill), Pub. L. No. 104-127, 110 Stat. 888, 917-918 (codified at 7 U.S.C. §§ 7255), provides:

SEC. 145. MILK MANUFACTURING MARKETING ADJUSTMENT.

(a) MAXIMUM ALLOWANCES ESTABLISHED.—No State shall provide for a manufacturing allowance for the processing of milk in excess of—

(1) $1.65 per hundredweight of milk for milk manufactured into butter and nonfat dry milk; and

(2) $1.80 per hundredweight of milk for milk manufactured into cheese.

(b) MANUFACTURING ALLOWANCE DEFINED.—In this section, the term "manufacturing allowance" means—

(1) the amount by which the product price value of butter and nonfat dry milk manufactured from a hundred pounds of milk containing 3.5 pounds of butterfat and 8.7 pounds of milk solids not fat resulting from a State's yield and product price formulas exceeds the class price for the milk used to produce those products; or

(2) the amount by which the product price value of cheese manufactured from a hundred pounds of milk containing 3.5 pounds of butterfat and 8.7 pounds of milk solids not fat resulting from a State's yield and product price formulas exceeds the class price for the milk used to produce cheese.

(c) EFFECT OF VIOLATION.—If the Secretary determines following a hearing that a State has in effect a manufacturing allowance that exceeds the manufacturing allowance authorized in subsection (a), the Secretary shall suspend purchases of cheddar cheese, butter, and nonfat dry milk produced in that State until such time as the State complies with such subsection.

(d) EFFECTIVE DATE; IMPLEMENTATION.—This section (other than subsection (e)) shall be effective during the period beginning on the first day of the first month beginning after the date of enactment of this title and ending on December 31, 1999. During that period, the Secretary may exercise the authority provided to the Secretary under this section without regard to the issuance of regulations intended to carry out this section.

(e) CONFORMING REPEAL.—Effective on the first day of the first month beginning after the date of enactment of this title, section 102 of the Food, Agriculture, Conservation, and Trade Act of 1990 (7 U.S.C. 1446e-1) is repealed.

Sections 61801-61802 of the California Food and Agriculture Code provide:

61801. The production of market milk is hereby declared to be a business affected with a public interest. The provisions of this chapter are enacted in the exercise of the police powers of this state for the purpose of protecting the health and welfare of the people of this state.

61802. The Legislature hereby declares all of the following:

(a) Market milk is a necessary article of food for human consumption.

(b) The production and maintenance of an adequate supply of healthful market milk of proper chemical and physical content, free from contamination, is vital to the public health and welfare, and the production, transportation, processing, and storage of market milk in this state is an industry affecting the public health.

(c) Because of the perishable quality of milk, the nature of milk production, the varying seasonal production and demand factors, and other economic factors affecting the milk industry, the potential exists for economic disruption, in the absence of regulation, in the production, marketing, and sale of market milk which may constitute a menace to the health and welfare of the inhabitants of this state and may tend to undermine sanitary regulations and standards of content and purity, however effectually the sanitary regulations may be enforced.

(d) Health regulations alone are insufficient to prevent economic disturbances in the production of milk which may disrupt the future supply of market milk and to

safeguard the consuming public from future inadequacy of a supply of this necessary commodity.

(e) It is the policy of this state to promote, foster, and encourage the intelligent production and orderly marketing of commodities necessary to its citizens, including market milk, and to eliminate economic waste, destructive trade practices, and improper accounting for market milk purchased from producers.

(f) It is recognized by the Legislature that the economic factors concerning the production, marketing, and sale of market milk in California may be affected by the national market for milk for manufacturing purposes.

(g) It is recognized by the Legislature that in recent years the supply of manufacturing milk in California, as defined in Section 32509, has consistently declined and continues to decline, and that market milk has virtually supplanted manufacturing milk for manufacturing purposes in this state, and that it is therefore necessary to conform the pricing standards governing minimum producer prices for market milk established under this chapter to current economic conditions.

(h) It is recognized by the Legislature that the levels of retail prices of milk and milk products paid by consumers are affected by a large number of economic and other factors apart from minimum producer prices for market milk established under this chapter, many of which factors are not within the power of the director to regulate or control, particularly since the Legislature repealed provisions concerning establishment of minimum wholesale and retail prices. It is further recognized by the Legislature that, in order to accomplish the purposes of this chapter and to promote

the public health and welfare, it is essential to establish minimum producer prices at fair and reasonable levels so as to generate reasonable producer incomes that will promote the intelligent and orderly marketing of market milk in the various classes, and that minimum producer prices established under this chapter should not be unreasonably depressed because other factors have affected the levels of retail prices paid by consumers.

Sections 62077-62078 of the California Food and Agriculture Code provide:

62077. A handler shall not pay any producer less than the applicable price established for the usage to which the market milk, purchased from him is applied pursuant to accounting procedures established by the director. If the market milk is not applied to any purpose set forth in Article 5 (commencing with Section 61931), then a handler shall not pay any producer less than the lower of the prices established under the applicable stabilization and marketing plan for class 4a and class 4b usage.

62078. All handlers who receive market milk within this state shall be obligated to pay minimum producer prices established under this chapter regardless of the area of origin of such milk, whether inside or outside the jurisdiction of the State of California.

Sections 62700-62704 of the California Food and Agriculture Code provide:

62700. The production and distribution of fluid milk and fluid cream is hereby declared to be a business affected with a public interest. The provisions of this chapter are enacted in the exercise of the police powers of this state for the purpose of protecting the health and welfare of the people of this state.

62701. It is hereby declared that fluid milk and fluid cream are necessary articles of food for human consumption; that the production and maintenance of an adequate supply of healthful milk of proper chemical and physical content, free from contamination, is vital to public health and welfare, and that the production, transportation, processing, storage, distribution and sale of fluid milk and fluid cream in the State of California is an industry, in whole and in part, affecting public health and welfare; that unfair, unjust, destructive and demoralizing trade practices have appeared within this industry and these practices constitute a menace to the health and welfare of the inhabitants of this state by threatening the stability of this industry and by thereby endangering the assurance to the people of the State of California of the maintenance of an adequate supply of this necessary commodity; that it is a policy of this state to promote, foster and encourage the intelligent production and orderly marketing of commodities necessary to its citizens, including fluid milk and fluid cream, and to eliminate speculation, waste, improper marketing, unfair and destructive trade practices, and improper accounting for milk purchased from producers.

62702. It is recognized by the Legislature that currently the powers conferred upon the director by Chapter 2 (commencing with Section 61801) are inadequate to enable the dairy industry to develop and maintain satisfactory marketing conditions and bring about and maintain a reasonable amount of stability and prosperity in the production of fluid milk and fluid cream; and that to accomplish these purposes, and particularly to insure to consumers within California an adequate and continuous supply of pure, fresh, and wholesome milk at fair and reasonable prices, including a reasonable estimate of the additional supply which is needed to provide for normal fluctuations in production and in consumer demand for those products, those powers must be supplemented by the powers conferred in this chapter upon the director to equalize gradually the distribution of class 1 usage among the producers of this state.

62702.1. It is recognized by the Legislature that the provisions for equalization of usages among producers and entry of new producers contained in the Gonsalves Milk Pooling Act, as originally enacted, and the pooling plan adopted thereunder, tended to achieve the purposes of that act; however, the provisions for more rapid equalization and additional new entry would more rapidly and effectively achieve the purposes of this chapter.

It is also recognized that some holders of pool quota and production base initially issued under the Gonsalves Milk Pooling Act have waited for several years for equalization, and that equalized producers have for a number of years not shared in any of the benefits of new quota created by new usage.

It is further recognized that it is necessary to promote and to attempt to assure more rapid equalization of the holders of pool quota issued subsequent to the initial allocation of production bases and pool quota pursuant to this chapter, and to provide for a program for entry and for equalization of new producers.

It is the purpose of the amendments to this chapter to provide a reasonable and equitable mechanism to permit more accelerated equalization, to equalize the holders of pool quota and production base initially issued under the Gonsalves Milk Pooling Act and who are not yet equalized, and to legislatively allocate in a fair and reasonable manner a share of new pool quota created by new usage to existing pool quota holders who are not equalized, to new producers, and to equalized pool quota holders who have not shared in the benefits of the growth of new usage since the original enactment of the Gonsalves Milk Pooling Act and the pooling plan thereunder.

62703. In effectuating the purposes of this chapter, a production base and a pool quota shall be established for each producer pursuant to Section 62707. The establishing of these bases and their functions shall be as provided in the pooling plan formulated by the director pursuant to the provisions of this chapter.

62704. The director is authorized to develop a proposed pooling plan and to designate the proposed areas in which the plan will be made effective. He shall appoint fluid milk producers, and representatives of producers, to be the members and alternate members of a formulation committee, reasonably representative of all producers and areas to be included in the proposed pooling plan, which committee shall advise and assist the director in the establishment of the proposed pooling plan area and in the formulation of the proposed pooling plan. The pooling plan shall include all areas covered by stabilization and marketing plans under Chapter 2 (commencing with Section 61801), except any relatively isolated region of the state may be excluded therefrom, if the director, after a public hearing, finds that the inclusion of the region is not practical or in conformity with the purposes of the pooling plan, or if he finds that the producers in the relatively isolated region do not desire to be a part of either their own or one of the pools.

Section 62711 of the California Food and Agriculture Code provides:

62711. (a) Except as provided in subdivision (h) of Section 62707, each producer shall be paid the highest usage for that amount of his or her fluid milk production that is equal to his or her pool quota and shall be paid the next highest usage for the difference between his or her pool quota and his or her production base under the production pool designated pursuant to this chapter and the lowest usage for all milk produced in

excess of his or her production base under the overproduction pool designated pursuant to this chapter.

(b) In calculating the pool value, the volume of milk that has been classified as restricted use market milk shall be credited to the handler at the class 4a or class 4b price, whichever is lower.

Sections 62716-62717 of the California Food and Agriculture Code provide:

62716. Following the required hearing, the director shall submit the pooling plan to producers concerned for their approval or disapproval in a statewide referendum. The approval or disapproval of individual producers voting in this referendum shall be kept confidential. Each producer shall have one vote and such vote shall be individually cast so that there will be no block voting. The director shall prepare a ballot. The ballot form shall be substantially as follows:

Ballot

Shall the proposed pooling plan be made effective?

Yes ____ No ____

In addition, the ballot shall include a statement of the voter's total production during the calendar month next preceding the month of the commencement of the referendum period, where and to whom such production was sold or otherwise disposed, and the producer's name and address.

The director may reveal the names of producers whose votes have been received to both proponents and opponents of the plan.

The referendum shall be set for a period of 60 days. The director may at his own discretion or upon a proper showing, extend the referendum for a period not to exceed 30 days.

62717. If the director finds that producers on a statewide basis have assented in writing to the proposed pooling plan submitted to them for assent, the director shall place the proposed pooling plan into effect. The director shall find that producers have assented to the plan if he finds on a statewide basis that not less than 51 percent of the total number of eligible producers in the state shall have voted in the referendum and finds one of the following:

(a) Sixty-five percent or more of the total number of eligible producers who voted in the referendum who produced 51 percent or more of the total amount of fluid milk produced in the state during the calendar month next preceding the month of the commencement of the referendum period by all producers who voted in the referendum approve the plan.

(b) Fifty-one percent or more of the total number of eligible producers who voted in the referendum who produced 65 percent or more of the total amount of fluid milk produced in the state during the calendar month next preceding the month of the commencement of the referendum period by all producers who voted in the referendum, approve the plan.

If the plan is not approved, the director may resubmit the plan, or submit a new plan, at any time after six months from the date the director announces the plan was not approved.

The director may amend the plan, after notice and public hearing has been given in the same manner as is provided in Chapter 2 (commencing with Section 61801) for stabilization and marketing plans, if he finds that the amendment is necessary to effectuate the purposes of this chapter. After the hearing, the director, upon his own motion, may make nonsubstantive amendments to the plan. The director may make substantive amendments to the plan only if producers assent to the proposed amendments at a referendum conducted in the same manner and

in the same number as provided for the referendum approving the pooling plan.

The director may terminate the plan on a statewide basis after notice and public hearing has been given in the same manner as is provided in Chapter 2 (commencing with Section 61801) for stabilization and marketing plans, if he finds that the plan is no longer in conformity with the standards described in, or will not tend to effectuate the purposes of, this chapter. The hearing may be held upon the motion of the director, and shall be held upon receipt of a petition signed by producers representing not less than 25 percent of the total number of all producers and not less than 25 percent of the total production of all producers.

The director shall submit the termination of the plan on a statewide basis in a referendum conducted in the same manner as provided for initial approval of the plan if, after notice and public hearing has been given in the same manner as is provided in Chapter 2 (commencing with Section 61801) for stabilization and marketing plans, he finds that a substantial question exists as to whether or not producers desire the plan to continue and shall submit the plan for termination upon receipt of a petition requesting termination signed by producers representing not less than 25 percent of the total number of all producers and not less than 25 percent of the total production of all producers. The plan shall be terminated if termination is favored by the same percentage of producers producing the same amount of fluid milk as required to initiate the plan.

REGULATORY PROVISIONS

CALIFORNIA DEPARTMENT OF
FOOD AND AGRICULTURE

POOLING PLAN FOR MARKET MILK,
AS AMENDED, EFFECTIVE JULY 1, 1997

Article 1. Definitions

Section 100. The definitions contained in Chapter 2 and Chapter 3, Part 3, Division 21 of the Food and Agricultural Code govern the construction of this Plan.

Section 101. "Act" shall be known and may be cited as the "Food and Agricultural Code".

Section 102. "Person" means any individual, firm, corporation, partnership, trust, incorporated or unincorporated association, nonprofit cooperative association, nonprofit cooperative marketing association, nonprofit corporation, or any other business unit or organization.

Section 103. "Secretary" means the Secretary of the California Department of Food and Agriculture or any employee of such department duly assigned or delegated to perform the functions required pursuant to this Plan.

Section 104. "Producer" means any person that produces market milk in the State of California from five or more cows.

Section 104.1 "Dairy ranch" and "dairy farm" are synonymous terms and mean a commercial production facility which produces milk.

Section 105. "Handler" means any person functioning in one or more of the following capacities:

(a) A person (other than a cooperative association) who operates one or more pool plants or operates any other plant from which Class 1 milk is disposed of during the month directly or indirectly in the pool area;

(b) A duly incorporated cooperative association of producers which has authority from its individual producer members to market their milk and receive payment therefore and which operates one or more pool plants or operates any other plant from which market milk products are disposed of directly or indirectly during the month in the pool area;

(c) A cooperative association in its capacity as the marketing agent for producer milk with respect to the milk of its member producers which it markets and receives payment therefore under authority of contracts or agreements with its individual members, which milk is not received at a plant operated by the cooperative or diverted therefrom;

(d) A person who operates a milk plant located in the pool area and receives market milk from one or more dairy ranches.

Section 106. "Pool plant" means:

(a) Any handler's milk receiving, processing, bottling, or manufacturing plant located in California from which Class 1 or mandatory Class 2 milk products are disposed of directly or indirectly in the pool area which receives market milk from one or more producers. Any handler with a pool plant qualified under this paragraph shall have the option to have any nonpool plant of that handler treated as either a "pool plant" or a "nonpool plant" for pool accounting purposes.

This option may only be made once in any 12-month period.

(b) Any handler's plant located in California which does not receive market milk from dairy farmers nor claim diversions of such milk, but which processes, packages, or manufactures milk or milk products or imitation milk, if Class 1 or mandatory Class 2 milk products are disposed of from such plant directly to retail or wholesale customers in the pool area. Any handler with a pool plant qualified under this paragraph shall have the option to have any nonpool plant of that handler treated as either a "pool plant" or a "nonpool plant" for pool accounting purposes. This option may only be made once in any 12-month period.

(c) The following plants shall not be deemed to be pool plants and for accounting and settlement purposes shall operate outside of the pool:

(1) The plant of an exempt producer-handler;

(2) The plant of any governmental agency, unless such plant notifies the secretary it has elected to participate in the Pooling Plan no later than 30 days after the effective date of the Plan or 30 days after said plant commences operations. Having been admitted to the pool pursuant to the request, the plant may not subsequently withdraw;

(3) A plant from which Class 1 or mandatory Class 2 milk products are disposed of to retail or wholesale outlets in areas outside the pool area, but not to retail or wholesale outlets (except milk

plants) in the pool area, nor to any pool plant having such dispositions;

(4) Any milk processing plant which is not approved by the appropriate public regulatory or health authority for the handling of market milk, provided that such plant receives no market milk except pool milk transferred or diverted by a handler and provided, further, that such plant notifies the secretary in advance that it chooses not to be a pool plant.

* * * * *

Section 115. "Quota milk" means that amount of fat and solids not fat contained in pool milk delivered by a producer during the month which is not in excess of the pool quota of such producer computed pursuant to Section 110 multiplied by the number of quota eligible days in the month.

Section 115.5 "Quota eligible days" means the number of calendar days in the month as reduced by the following:

(a) The number of days on which a producer (including producer members or patrons of cooperative associations) is degraded as defined in Section 113.3 in accordance with procedures established by an appropriate public regulatory or health authority;

(b) The number of days, on which the secretary agrees, a producer's milk did not meet the quality requirements specified in the producer's contract with the handler and such milk was not sold or used for Class 1 purposes and was otherwise handled in accordance with Section 62715 of the Food and Agricultural Code.

Section 116. "Daily production milk" or "daily base milk" means that amount of pool milk delivered by a producer during the month which is in excess of the pool quota computed pursuant to Section 110 of such producer but not in excess of the production base computed pursuant to Section 108.

Section 116.5 "Production milk" or "base milk" means that amount of pool milk delivered by a producer during the month which is equal to the monthly production base as computed pursuant to Section 108.5, less the amount of quota milk delivered during the month as computed pursuant to Section 115.

Section 117. "Overproduction milk" or "overbase milk" means that amount of pool milk delivered by a producer during the month, exclusive of milk degraded in accordance with procedures established by the appropriate public regulatory or health authority, which does not qualify as quota milk or base milk.

* * * * *

Article 2. Eligibility for a Production Base and Pool Quota

Section 200. The secretary shall compute and establish a production base and pool quota for each producer who produced market milk which was delivered to a plant regulated under one or more of the Stabilization and Marketing Plans effective in the pool area specified in Section 118, during any base period, subject to the following requirements:

(a) If a producer operated more than one dairy farm holding valid market milk permits during any base period, or during the months of December 1966 and January and February 1967 for producers whose production base is computed under Paragraph 108(c) a separate production base and pool quota shall be computed, for

deliveries from each such dairy farm. If such farms were not operated separately for the entire base period selected, they shall be combined for computing base and quota;

(b) Only one production base and one pool quota shall be computed for a single production unit which was jointly owned or operated by one or more persons during any base-forming period;

(c) Producers of certified milk or guaranteed raw milk who qualify under Section 104 shall have the option to be included in the Plan at the time of the adoption of the initial Pooling Plan, provided they so state in an application to the secretary submitted no later than the effective date of the Plan. Admission to the Pooling Plan at a later date by such producers shall be on the basis of the production base and pool quota computed according to the same procedure provided under Section 602, for producer-handlers;

(d) Any person who purchased or otherwise acquired a producer's business or a portion of a producer's business after June 30, 1966, and prior to the effective date of this Pooling Plan, shall succeed to the same proportion of the producer's production base and pool quota, provided that the same rules concerning eligibility for and computation of base and quota amounts shall apply to the business so transferred as though no change in ownership had occurred. For purposes of this paragraph, the term "business" shall be deemed to be the dairy herd and other physical facilities which made up the business transferred, or all or any portion of a market milk supply contract or

allotment which was purchased or otherwise acquired under conditions of continuing performance. The transaction by which the business was acquired shall be fully disclosed and documented on forms provided by and filed with the secretary. Any misrepresentation of facts or falsity in statements by either party shall constitute cause for forfeiture of all or any portion of the production base and pool quota under consideration as purchased or acquired. Any disagreement of the producer with the computation of a base and quota which involves this paragraph shall be referred to the Producer Review Board.

Article 3. Adjustment of Production Base and Pool Quota

Section 300. After August 31 of each year, and prior to January 1 of the following year, the secretary shall determine the actual new daily Class 1 and Class 2 usage of solids not fat for the pool area, if any, as follows:

(a) The Class 1 and Class 2 usage of solids not fat for the most recent September through August 12-month period shall be measured against the Class 1 and Class 2 usage of solids not fat for the previous highest identical 12-month period since the 1988-1989 measurement period;

(b) The Class 1 and Class 2 usage of solids not fat for each 12-month period shall take into consideration the total Class 1 and Class 2 usage generated by the pool, plus that amount which is exempted from pool accountability by producer-handlers operating with an exemption under the provisions of Article 6 or Article 6.5, and further adjusted by the amount of certified raw milk used for Class 1 and Class 2 purposes;

(c) If new Class 1 and Class 2 usage of solids not fat is to be assigned pursuant to this article, a ratio of 1 pound of fat to 2.5 pounds of solids not fat shall be used to determine the new Class 1 and Class 2 usage of fat.

Section 301. The total new Class 1 and Class 2 usage computed in accordance with Section 300, shall be allocated to producers as pool quota as follows:

(a) Forty percent of the new quota shall be available for allocation in accordance with the following provisions:

(1) A factor shall be computed based on the production base and pool quota in effect on December 1 for those producers who have not reached the equalization point, using one of the following methods:

(i) For those producers who meet the one-year production requirement pursuant to Section 352, and who received an initial allocation of quota and production base after December 20, 1976 under the provisions of Article 3.5, a factor equal to 75 percent of currently held production base increased by unissued qualifying period production plus the difference between the currently held production base increased by unissued qualifying period production and pool quota; or

(ii) For all other qualifying producers, a factor equal to 75 percent of the production base plus the difference between the production base and pool quota.

(2) Divide the factor obtained for each producer under Subparagraph 301(a)(1), by the total of the factors obtained for all producers under that Subparagraph;

(3) The result obtained from the computation under Subparagraph 301(a)(2) shall determine the percentage of new pool quota which is available for allocation to each producer. This amount as adjusted by Subparagraph 301(a)(4) shall be assigned to each producer, except that no allocation shall be made to any producer which will result in a pool quota exceeding the equalization point;

(4) If, after these computations, the pool quota of the milk fat or solids not fat component of any producer is less than the equalization point of such producer by no more than 3.5 or 8.5 pounds, respectively, both components shall be increased to the equalization point;

(5) The secretary shall not be obligated to reduce the new quota available for allocation computed pursuant to Paragraph 301(a) by the additional quota assigned pursuant to Subparagraph 301(a)(4), but shall reallocate one time only the residual quota occurring because of a producer reaching

equalization by the operation of Subparagraph 301(a)(3);

(6) Any new pool quota remaining to be assigned after all participating pool quotas have reached the equalization point shall be added to that available under Paragraph 301(b) for assignment.

(b) Forty percent of the new quota, increased by that made available under Subparagraph 301(a)(6) shall be allocated to producers whose total production base and pool quota are equal to or above the equalization point. Each such producer's allocation shall be in the same ratio as that producer's total holdings of quota bears to the total quota holdings of all such producers.

(c) There shall be no forfeiture of any pool quota, including that assigned pursuant to this article, except as provided under Article 5.

Section 302. Producers who qualify under Article 3.5 for participation in new pool quota pursuant to Paragraph 301(a) shall receive additional production base at the lesser of 111 percent of the additional pool quota allocated or their unissued qualifying period production. Producers reaching equalization under this provision will receive additional production base equaling unissued qualifying period production. A producer who qualifies under Article 3.5, will be considered to have reached equalization when quota is equal to or greater than 95 percent of the sum of currently held production base and unissued qualifying period production.

Article 3.5. Allocation of New Producer's Production Base and Pool Quota

Section 350. Twenty percent of total new Class 1 and Class 2 usage computed in accordance with Section 300 shall be available for initial quota allocations to new producers as

defined in Article 4.5. Such allocations shall be made available as of February 1 of each year to new producers who qualify under Article 4.5. This amount shall be added to any previous amount made available pursuant to this section and not allocated.

In addition, any quota which has reverted to the pool, under the provisions of Article 5 shall be allocated on a continuing basis to qualifying new producers. This quota will be accumulated until such time as there is sufficient quota to issue to the next new producer on the priority list under the provisions of Sections 351 and 453. Such quota shall be made available for allocation within 90 days after the quota has reverted to the pool.

Section 351. The new producer's initial allocation shall be:

(a) Pool quota at the lesser of:

(1) 95 percent of the qualifying period production as defined in Section 127, or

(2) An amount determined by multiplying a factor times 150 pounds of fat and 375 pounds of solids not fat. The factor to be used shall be the larger of:

(i) 40 percent;

(ii) The lowest factor obtained by dividing the pool quota solids not fat of each producer who receives an allocation pursuant to Article 3 by that producer's production base of solids not fat.

(b) Production base at the lesser of:

(1) The qualifying period production as defined in Section 127, or

(2) 111 percent of the pool quota allocated.

Section 352. Producers who received an initial allocation under Section 351 shall participate in future allocations under Sections 301 and 302 after a one-year minimum period of continuous production following initial allocation.

Section 353. Any pool quota received pursuant to Sections 351 and 352 shall be subject to the provisions of Article 5.

Section 354. No allocation shall be made to any producer which will result in a pool quota exceeding the equalization point.

Article 4.5. New Producer Entry

Section 450. A new producer, as defined under Section 120, and who qualifies under this article, may make application to the secretary on forms provided to establish eligibility for an allocation of quota. Quota, if available, will be allocated within 90 days following the receipt of the application.

Section 451. To qualify for allocation of new quota, a new producer must:

(a) Obtain a market milk permit from the appropriate California regulatory or health authority prior to making application, and

(b) Have a market milk contract and be shipping to a pool handler prior to making application, and

(c) Have one year of continuous commercial production within the State of California prior to making application, and maintain continuous market milk production until receiving an allocation of new quota, and

(d) Satisfy the requirement that at least 50 percent of the interest in the dairy operation is owned by individuals directly engaged in the management and operation of the dairy, and

(e) Operate a production facility that is completely separate and apart from any other production facility for a minimum of one year prior to making application and until new quota has been allocated, and

(f) Satisfy the requirement that no individual or person may apply for new quota on more than one production facility, and

(g) Operate a production facility under the same ownership percentages as stated in the application for a minimum of one year prior to making application and until new quota has been allocated.

* * * * *

Article 8.1. Adjustment to Handler Obligations for Plant to Plant Transfers

Section 810. Each handler entitled to adjustments for plant to plant transfers, who is located within a supply county, as set forth in Section 300.2 of the Stabilization and Marketing Plans, shall submit a report for each month which shall be postmarked no later than 45 days following the end of the month. Such report shall set forth adjustments to the handler's pool obligation as specified in this article.

Section 811. The following shall be shown for transfers for which a transportation credit is provided for under Section 300.2 of the Stabilization and Marketing Plans:

(a) The pounds and milk fat content of market milk, market skim milk, and market cream transferred in bulk form to each plant located in a county designated as a deficit county under Section 300.2 of the Stabilization and Marketing Plans

and the classification assigned under the provisions of Sections 802 and 812 of the Pooling Plan for Market Milk;

(b) The computation of the transportation credit for market milk and market skim milk (excluding condensed skim milk and market cream) based on the rates in Section 300.2 of the Stabilization and Marketing Plans.

Section 812. Handlers who transfer market milk and market skim milk (excluding condensed skim and market cream) in bulk form from a pool plant located in a county designated as a supply county to another pool plant located in a county designated as a deficit county, as set forth in Section 300.2 of the Stabilization and Marketing Plans, shall be entitled to request the following adjustments provided there is concurrence by the receiving plant:

(a) Market milk and market skim milk (excluding condensed skim milk and market cream) may be reassigned from the original classification, as provided for in Subparagraph 802(a)(3), to Class 1 provided that the total quantity assigned to Class 1 shall not exceed the total Class 1 inplant usage of the receiving plant;

(1) The additional quantity classified as Class 1 shall be deducted on a pro rata basis from the original Class 2, 3, 4a, and 4b classification. The shipping handler will be charged for Class 1 and credited for Class 2, 3, 4a, and 4b at the shipping handler's market area prices. The receiving handler will be credited for Class 1 and charged for Class 2, 3, 4a, and 4b at the receiving handler's market area prices.

(b) The provisions of this section shall only apply to transfers made during the months of September through the following February.

Section 813.The following shall be shown for transfers for which a credit is requested under Section 812:

(a) The original classification and value assigned to market milk, market skim milk, and market cream transferred in bulk form and the reassigned classification of market milk and skim milk (excluding condensed skim milk and market cream);

(b) The computed value of the original and revised classifications at both the shipping and receiving handler market area prices;

(c) The net adjustment to the pool obligation of both the shipping and receiving handler.

Section 814. The secretary shall verify and correct, if necessary, the adjustments requested under this article and adjust the handler obligation accounts within 60 days after receiving the handler report. The handler adjustments shall be reflected in the fat and solids not fat prices by adjustment of the net pool balance utilized pursuant to Paragraph 902(c) or Section 906, whichever is applicable.

Article 9. Computation of Handler Obligation and Quota, Base, and Overbase Pool Prices

Section 900. The gross pool obligation of each handler for each of the plants or for a cooperative association acting as a handler under Paragraph 105(c) shall be computed as follows:

(a) Multiply the quantities for each class as determined under Sections 801, 802 and 803 for each plant by the appropriate price announced

for such class by the secretary, f.o.b. such handler's plant or the pool or nonpool plant to which diverted;

(b) Multiply the quantities for each class as determined under Sections 801, 802 and 803 for each cooperative association acting as a handler under Paragraph 105(c) by the appropriate price announced for such class by the secretary, f.o.b. the pool or nonpool plant where the milk was first received from producers;

(c) Deduct an amount computed by multiplying the pounds of solids not fat or the skim milk equivalent of condensed skim milk used in fortifying Class 1 products by the appropriate charge allowable for condensing or drying of market skim pursuant to the applicable Stabilization and Marketing Plan.

(d) Deduct from the amounts calculated above, a credit to the handler's obligation for milk received from other sources not included in receipts deducted in Section 802 which shall be determined as follows:

(1) The value based on the receiving plant's inplant usage as defined in Section 130 or the value based on the current month's quota fat price for the milk fat component and the current month's quota solids not fat price plus the pool price modification rate for the value of the solids not fat component, whichever is less.

(2) The value based on subparagraph (d)(1) of this Section or the value based on the current month's overbase fat price for the milk fat component and the current month's overbase solids not fat price plus the pool price

modification rate for the value of the solids not fat component, whichever is greater.

Section 901. The total pounds of milk in each class and the pool value thereof shall be computed by the secretary as follows:

(a) (1) Determine the net total pounds of Class 1 milk remaining under Paragraph 803(m) for all handlers and combine into one total sum the obligations of all handlers for such Class 1 milk;

(2) Subtract the net sum of all adjustments computed pursuant to Paragraphs 900(c) which represent modifications in the actual obligation of all handlers for Class 1 milk.

(b) Make similar determinations of the net total pounds and value of each of the other classes of utilization for all handlers;

(c) For those months in which the secretary has implemented the collection of security charges provided for in Chapter 2.5, Part 3, Division 21 of the Food and Agricultural Code, adjust the values of each class as determined under Paragraphs 901(a) and 901(b) by:

(1) Multiplying the total pounds in each class by the rate established in Section 62561 of the Food and Agricultural Code; and

(2) Deducting from the total value of each appropriate class, the amounts calculated under Subparagraph (1). The resulting value for each class shall be utilized in computing the prices under Sections 902, 903 and 904 or 906.

Section 901.5 For those months in which the secretary has implemented a temporary increase in the minimum prices of milk pursuant to Section 62062.2 of the Food and Agricultural Code, adjust the values of each class as determined under Paragraphs 901(a) and (b) by:

(a) Multiplying the total pounds in each class by the temporary price increase for such class as set forth in Section 300.0 of the Stabilization and Marketing Plans. The funds generated shall form a subpool to be distributed equally to all milk production in the pool;

(b) Deducting from the total value of each appropriate class, the amounts calculated under Paragraph (a), hereof. The resulting value for each class shall be utilized in computing the initial prices under Sections 902, 903 and 904.

Section 902. This section is not in effect as long as Section 62750 of the Food and Agricultural Code is in effect. No later than the 24th day of each month, the secretary shall compute and announce the quota price for the fat and solids not fat components of quota milk received from producers during the preceding month, in accordance with the following procedures:

(a) Compute the total value of the quota pool and the total value for other source milk by assigning thereto the value or a proportionate share of the total value of the milk fat and solids not fat usages necessary to reflect the total pounds of pool milk which qualified as quota fat and quota solids not fat for all producers, and the total pounds of fat and solids not fat other source milk, excluding the quota fat and quota solids not fat of producer-handlers which was assigned under Paragraph 803(a). The computation of Class 1 solids not fat shall include the value of

the fluid component which is contained in the Class 1 skim usage. The values shall be assigned in the following sequence: Class 1, Class 2, Class 3, and then the higher of Class 4a or Class 4b (based on hundredweight value computed at 3.5 percent butterfat and 8.7 percent solids not fat);

(b) Add an amount for each component to the value as necessary to reflect the total amount of regional quota adjusters computed pursuant to Article 9.1;

(c) Add not less than half of the amount on hand in the net pool balance for the respective component of milk;

(d) Subtract from each component the value a figure equal to not more than one percent of the resulting balance, plus or minus any amount necessary to eliminate any fractional amounts of less than one-tenth cent per pound in the price of quota fat and solids not fat;

(e) Divide the resulting sums by the pounds of the components of quota milk plus the pounds of the components of other source milk computed under Paragraph 902(a). The resulting figure shall be the quota pool price for such components.

Section 903. This section is not in effect as long as Section 62750 of the Food and Agricultural Code is in effect. No later than the 24th day of each month, the secretary shall compute and announce the base price for the fat and solids not fat components of base milk received from producers during the preceding month, in accordance with the following procedures:

(a) Combine the values computed pursuant to Paragraphs 902(a), and 904(a);

(b) Subtract the total amount obtained under Paragraph (a), hereof, and any security charges calculated under Paragraph 901(c) from the gross pool obligation of all handlers as computed under Section 900(a), (b) and (c);

(c) Divide the remaining value of the milk fat and solids not fat portions of pool milk by the pounds of milk fat and solids not fat, respectively, contained in base milk and round the resulting figure for milk fat and for solids not fat to the nearest one-tenth cent. The prices so computed shall be the base pool prices.

Section 904. This section is not in effect as long as Section 62750 of the Food and Agricultural Code is in effect. No later than the 24th day of each month, the secretary shall compute and announce the overbase price for the fat and solids not fat components of overbase milk received from producers during the preceding month, in accordance with the following procedures:

(a) Compute the total value of the overbase pool by assigning thereto the total value or a proportionate share of the total value of the fat and solids not fat components of Class 4a and Class 4b beginning with Class 4a or Class 4b milk, whichever has the lower hundredweight value computed at a 3.5 percent butterfat and 8.7 percent solids not fat basis, as necessary to reflect the total pounds of pool milk which qualified as overbase fat and solids not fat;

(b) Divide the values obtained pursuant to Paragraph (a) of this section by the pounds of fat and solids not fat, respectively, in overbase milk and round the resulting figure for milk fat and

for solids not fat to the nearest one-tenth cent. The prices so computed shall be the overbase pool prices.

Section 905. For those months in which the secretary has implemented a temporary increase in the minimum prices of milk pursuant to Section 62062.2 of the Food and Agricultural Code, distribute the subpool funds generated pursuant to Paragraph 901.5(a) by:

(a) Dividing the total value of the temporary price increase for each component of milk by the total pounds of that component which was produced and received from producers participating in the pool during the preceding month to determine the value per pound; and

(b) Adding this value per pound adjustment to the initial quota, base and overbase prices computed under Sections 902, 903 and 904. These prices so adjusted shall be the quota, base and overbase pool prices announced for that month by the secretary.

Section 906. This section applies as long as Section 62750 of the Food and Agricultural Code is in effect. No later than the 24th day of each month, the secretary shall compute and announce the prices for the fat and solids not fat components of quota and nonquota milk received from producers during the preceding month, in accordance with the following procedures:

(a) Compute the total value of pool milk by assigning thereto the total values of the milk fat and solids not fat usages, except the fat and solids not fat exemption of producer-handlers which was assigned under Paragraph 803(a). The total value of pool milk shall include the value of usage for other source milk. The computation of Class 1 solids not fat shall

include the value of the fluid component which is contained in the Class 1 skim usage;

(b) The total value of the quota premium pool shall be the sum of the following computations:

(1) Multiply the total solids not fat quota pounds by $0.195 and subtract the total amount of regional quota adjusters, computed pursuant to Article 9.1;

(2) Multiply the total solids not fat of other source milk by $0.195.

(c) Adjust the total fat value, calculated in Paragraph 906(a), by:

(1) Subtracting the fat value of the plant to plant transportation adjustments, calculated pursuant to Article 8.1;

(2) Adding not less than half of the amount on hand in the net pool balance for fat;

(3) Subtracting from the fat value a figure equal to not more than one percent of the resulting balance, plus or minus any amount necessary to eliminate any fractional amounts of less than one-tenth cent per pound.

(d) Divide the adjusted total fat value, as calculated in Paragraph 906(c), by the total quota and nonquota fat pounds plus the total fat pounds of other source milk to determine the quota and nonquota fat prices;

(e) Compute the adjusted solids not fat value from the solids not fat value, calculated in Paragraph 906(a) by:

(1) Subtracting the solids not fat value of the plant to plant transportation adjustments, calculated pursuant to Article 8.1;

(2) Subtracting the total transportation allowance, calculated pursuant to Article 9.2;

(3) Adding not less than half of the amount on hand in the net pool balance for solids not fat;

(4) Subtracting a figure equal to not more than one percent of the resulting balance, plus or minus any amount necessary to eliminate any fractional amounts of less than one-tenth cent per pound;

(5) Subtracting the quota premium pool value from the total solids not fat value, calculated pursuant to Paragraph 906(b).

(f) Divide the adjusted solids not fat value as calculated in Paragraph 906 (e), by the total quota and nonquota solids not fat pounds plus the total solids not fat pounds of other source milk, to determine the nonquota solids not fat price;

(g) Add $0.195 per pound to the solids not fat price calculated in Paragraph 906(f) to determine the quota solids not fat price.

Article 9.1. Regional Quota Adjuster

* * * * *

Section 920. Each producer shall be subject to the provisions of this article and shall, where applicable, participate in the transportation allowances set forth in Paragraph 921.2 and transportation sub-pools, when Section 925 is in effect.

* * * * *

Article 10. Reports and Payments to Producers and Equalization of Returns

* * * * *

Section 1001. Each handler other than those defined in Paragraphs 105(b) and (c) shall pay individual producers from whom milk is received directly at the pool plant or diverted by such handler to pool and nonpool plants at no less than the rates specified and no later than the dates indicated:

(a) On or before the 15th day of the month, each handler shall pay each producer the approximate net value for milk received or diverted during the last half of the preceding month based on the quota, base, and overbase prices announced for the month before the milk was received or diverted;

(b) On or before the last day of the month, each handler shall make final payment to each producer for the total value of milk received or diverted during the preceding month, excluding

pool milk received by nonpool plants as a direct purchase from individual producers, at not less than the rates specified below subject to adjustments, where applicable for transportation allowances and transportation charges specified in Article 9.2, and subject to deductions for advance payments made under this paragraph and Paragraph (a), hereof, for applicable charges for hauling the milk from ranch to plant and for assignments or other proper charges authorized in writing by the producer or required under Chapters 1, 2, and 3 of the Food and Agricultural Code, plus a payment for the approximate value of the milk based on the quota, base, and overbase prices for the preceding month for milk received or diverted during the first 15 days of the month:

(1) Quota milk delivered during the preceding month shall be paid for at the quota price announced by the secretary in accordance with Section 902, as adjusted for the regional quota adjuster pursuant to Article 9.1;

(2) Base milk delivered during the preceding month shall be paid for at the base price announced by the secretary in accordance with Section 903;

(3) Overbase milk delivered during the preceding month shall be paid for at the overbase price announced by the secretary in accordance with Section 904.

(c) Any handler qualified pursuant to Paragraph 105(a) who receives milk, skim milk, or cream at its pool plant(s) from handlers, as defined

pursuant to Paragraphs 105(b) and (c), shall pay such handlers no less than the applicable minimum class prices for such milk, skim milk, or cream no later than the dates specified:

(1) For milk received during the first 15 days of the month on or before the 28th day of such month based on the appropriate class prices, provided the class price announced for the preceding month shall be used for any class for which the current month's price has not yet been announced by the secretary;

(2) For milk received during the period from the 16th to the end of the month on or before the 13th day of the following month at no less than the appropriate class prices subject to any adjustment necessary due to overpayments or underpayments resulting from the use of tentative prices under Subparagraph (1), hereof.

(d) Each handler operating a nonpool plant as defined in Section 111 that receives market milk as a direct purchase from producers or from handlers defined pursuant to Paragraphs 105(b) and ©) shall pay for such milk at no less than the classified prices established by the Stabilization and Marketing Plans. The total combined inplant and derived usage of the nonpool plant shall be allocated among all producers each month.

* * * * *

Section 1003. Each handler shall make payment to the secretary on or before the second day after receiving notice of

any amount due pursuant to this section of the amount computed as follows:

(a) The secretary shall compute the total of the amounts due from such handler to individual producers at the rates specified in Subparagraphs 1001(b)(1), (2), and (3), as adjusted for regional quota adjusters and transportation allowances, pursuant to Articles 9.1 and 9.2, and transportation sub-pool charges, if in effect;

(b) Subtract the sum computed pursuant to Paragraph (a), hereof, from the gross pool obligation of such handler computed pursuant to Section 900, if such pool obligation is larger than the amount owed to producers. The resulting figure shall be known as the handler's net pool obligation;

(c) In the event any handler fails to pay to the secretary, the net financial obligation to the pool resulting from its operation on or before the 15th day of the second month following the month for which the obligation was incurred, the secretary may add to such unpaid balance interest at the rate of 1 percent (1%) per month computed from the first day of the second month following the month for which the obligation was incurred until such obligation is paid. Such obligation shall be reduced by the following:

(1) Payments received on or before the 15th of the month; and

(2) Any credits resulting from adjustments to previous obligations.

The interest charged under this section shall be added to the milk fat and solids not fat Producer Equalization Funds on a 1 to 2.5 ratio, respectively. The handler shall not be entitled to pass such interest charge on to the producers.

(d) Except as provided in Paragraphs (e) and (f) of this section, the obligation of any handler to pay money required to be paid pursuant to this section shall terminate two years after the last day of the month during which the secretary receives the handler's report of receipts and utilization and disposition of which such obligation is based, unless within such two-year period the secretary notifies the handler in writing that such money is due and payable. Written notice shall be complete upon mailing to the handler's last known address the following information:

(1) The amount of the obligation;

(2) The month on which the obligation is based; and

(3) The account for which it is to be paid.

(e) If a handler fails or refuses to make available to the secretary all records required under this Plan, the secretary may notify the handler in writing as provided in Paragraph 1003(d), of such failure or refusal. If the secretary so notifies the handler, the two-year period in respect to such obligation shall not begin to run until the first day of the month following the month during which all records pertaining to the obligation were made available to the secretary;

(f) A handler's obligation under this Plan shall not be terminated for any transaction involving fraud or willful concealment of a fact on the part of the handler against whom the obligation is being imposed;

(g) Unless the handler gives notice within the applicable two-year period, the obligation of the secretary to pay a handler any money the handler claims to be due under the provisions of this Plan shall terminate two years after the end of the month during which the market milk involved in the claim was received.

Section 1004. If the gross pool obligation of the handler, as computed under Section 900, is less than the amount owed producers under Subparagraphs 1001(b)(1), (2) and (3) the secretary shall make payment of any difference to such handler from funds available in the Producer Equalization Funds on the 28th day after the end of the month or as soon thereafter as funds are available, provided that if adequate funds are not available in the appropriate fund on such date, a proportionate distribution of available funds shall be made to all handlers entitled to receive payments under this section.

ORDER GRANTING CERTIORARI

SUPREME COURT OF THE UNITED STATES

01-950

HILLSIDE DAIRY INC., A&A DAIRY, L&S DAIRY, AND MILKY WAY FARMS,
Petitioners,

v.

WILLIAM J. LYONS, JR., SECRETARY, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, ET AL.,
Respondents.

01-1018

PONDEROSA DAIRY, PAHRUMP DAIRY, ROCKVIEW DAIRIES, INC., AND D. KUIPER DAIRY,
Petitioners,

v.

WILLIAM J. LYONS, JR., SECRETARY, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, ET AL.,
Respondents.

January 10, 2003

Case below, 259 F.3d 1148

Petitions for writs of certiorari to the United States Court of Appeals for the Ninth Circuit granted. The cases are consolidated and a total of one hour is allotted for oral argument.

PETITIONER'S

BRIEF

Nos. 01-950, 01-1018

FEB 24 2003

In the Supreme Court of the United States

HILLSIDE DAIRY, INC., A&A DAIRY, L&S DAIRY, and MILKY WAY FARMS,

Petitioners,

v.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, and ROBERT TAD BELL, Undersecretary, Department of Food & Agriculture, State of California,

Respondents.

PONDEROSA DAIRY, PAHRUMP DAIRY, ROCKVIEW DAIRIES, INC., and DARREL KUIPER and DIANE KUIPER, D/B/A D. KUIPER DAIRY,

Petitioners,

v.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, and ROBERT TAD BELL, Undersecretary, Department of Food & Agriculture, State of California,

Respondents.

On Writs Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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QUESTIONS PRESENTED

Petitioners accept the Solicitor General's formulation of the first question presented in his cert.-stage amicus brief:

1. Whether 7 U.S.C. § 7254 exempts California's pricing and pooling regulations from scrutiny under the Commerce Clause.

The second question presented (originally presented in the petition in No. 01-1018) is narrower than the second question presented in the Solicitor General's cert.-stage amicus brief and is as follows:

2. Whether substantive judicial review of discriminatory effect under the Privileges and Immunities Clause is foreclosed as a matter of law when state discrimination is facially based on the out-of-state location of a farm or business, but the challenged state statute does not expressly refer to out-of-state "residency" or "citizenship."

RULE 24.1(b) AND 29.6 STATEMENT

Petitioners in No. 01-950 are Hillside Dairy, Inc., A&A Dairy, L&S Dairy, and Milky Way Farms. Petitioners in No. 01-1018 are Ponderosa Dairy, Pahrump Dairy, Rockview Dairies, Inc., and Darrel and Diane Kuiper, d/b/a D. Kuiper Dairy. Respondents in both cases are William J. Lyons, Jr., Secretary of the California Department of Food and Agriculture, successor to Ann M. Veneman, Secretary of the California Department of Food and Agriculture at the time these lawsuits were filed; and Robert Tad Bell, Undersecretary of the California Department of Food and Agriculture, successor to A.J. Yates, Deputy Secretary of the California Department of Food and Agriculture at the time these lawsuits were filed. See 01-950 Pet. App. A14 nn.* & 1 (noting substitution of Lyons for Veneman); *id.* at A1 (listing Yates as a defendant-appellee); Sup. Ct. R. 35.3. Ms. Veneman is now the U.S. Secretary of Agriculture. Mr. Yates is now the Administrator of the Agricultural Marketing Service of the U.S. Department of Agriculture.

None of the corporate petitioners has issued stock or securities that are publicly traded, and none of the petitioners has a corporate parent, subsidiary, or affiliate that has issued publicly traded stock or securities.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15)[1] is reported at 259 F.3d 1148. The order denying rehearing and rehearing en banc (Pet. App. A59-A60) is unreported. The opinion and order of the district court granting summary judgment for respondents (Pet. App. A16-A22) is unreported.

JURISDICTION

The judgment of the court of appeals was entered August 9, 2001 (Pet. App. A1). Rehearing was denied September 24, 2001 (Pet. App. A59). The petitions for a writ of certiorari were filed December 26, 2001, and granted January 10, 2003. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Commerce Clause of Article I, Section 8, of the Constitution provides: "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The Privileges and Immunities Clause of the Constitution, Art. IV, § 2, cl. 1, provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Sections 143-145 of the Federal Agricultural Improvement and Reform Act of 1996 (1996 Farm Bill), Pub. L. No. 104-127, 110 Stat. 888, 915-918 (codified at 7 U.S.C. §§ 7253-7255), appear at JA 17-22 and at Pet. App. A65-A70.

California Food & Agric. Code § 35784 provides: "Market milk, at the time of delivery to the consumer, shall contain not

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[1] Citations to "Pet. App." are to the appendix to the petition in No. 01-950.

less than 3.5 percent of milk fat and not less than 8.7 percent solids not fat. The minimum percentages of milk fats and solids not fat required by this section may vary by an amount no greater than 0.1 of 1 percent, provided that the total combined percentages of milkfat and solids not fat, at the time of delivery to the consumer, shall equal or exceed 12.2 percent."

Excerpts of the California Department of Food and Agriculture's Pooling Plan for Market Milk, as amended, effective July 1, 1997, appear at JA 32-60.

STATEMENT

California engages in milk product *compositional* regulation as well as *economic* regulation of raw, unprocessed milk. So does the federal government.

California's product composition regulations include standards of identity for, among other things, milk that is packaged and consumed as a beverage. Those standards are contained in various sections of the Milk and Milk Products Act of 1947, Division 15 of the California Food and Agricultural Code. See Cal. Food & Agric. Code §§ 32501-39912. These standards of identity for fluid milk are sometimes referred to as "fluid milk standards" or "product composition regulations." The standard for packaged whole milk in Section 35784 includes higher requirements for "solids not fat" (*e.g.*, protein, lactose, and minerals) content of certain milk than the corresponding federal requirements. See also Cal. Food & Agric. Code § 38181, 38191, 38211. The California product composition requirements are administered by the Milk and Dairy Foods Control Branch of the California Department of Food and Agriculture (CDFA). See http://www.cdfa.ca.gov/ahfss/mdfc. Federal standards of identity and composition for milk and other food products are administered by the Food and Drug Administration (FDA). See 21 U.S.C. §§ 341, 371; 21 C.F.R. Parts 130-169; 21 C.F.R. § 131.110 (milk standards). Food product composition standards, also called "standards of

identity," are essentially standardized recipes to correspond with specific product names. See, *e.g.*, *62 Cases of Jam* v. *United States*, 340 U.S. 593 (1951); *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U.S. 218 (1943).

California's economic regulation of milk includes milk pricing laws, milk pooling laws, and corresponding regulations. California's raw milk pricing laws are contained in the Milk Stabilization Act, Division 21, Part 3, Chapter 2, of the California Food and Agriculture Code. See Cal. Food & Agric. Code §§ 61801-62403; JA 23-25. California's milk pooling laws are contained in the Gonsalves Milk Pooling Act, Division 21, Part 3, Chapters 3 and 3.5, of the California Food and Agriculture Code. See Cal. Food & Agric. Code §§ 62700-62756; JA 25-31. The Dairy Marketing Branch of CDFA administers two Stabilization Plans under the Milk Stabilization Act. See http://www.cdfa.ca.gov/dairy/stabplans/ncastabplan.PDF; http://www.cdfa.ca.gov/dairy/stabplans/scastabplan.PDF. The Milk Pooling Branch of CDFA administers the Pooling Plan under the Milk Pooling Act. See JA 32-60 (1997 version of Pooling Plan); http://www.cdfa.ca.gov/mkt/mp/POOLPLAN_09-01.pdf (current version).

These two statutes and the corresponding plans are often referred to together as California's system of milk "pricing and pooling regulations." The U.S. Department of Agriculture (USDA) administers the corresponding federal plans – known as "Federal Milk Marketing Orders" (FMMO). See 7 C.F.R. §§ 1000-1135; see also 7 U.S.C. § 608c; *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 341-343 (1984).

This case concerns a statute – Section 144 of the 1996 Farm Bill, 7 U.S.C. § 7254 (JA 20-21) – that negates federal preemption of certain aspects of California's *compositional*

regulation of beverage milk.[2] No one disputes that a purpose – if not *the* purpose – of the statute was to protect California's higher fluid milk standards from preemption under the Nutrition Labeling and Education Act of 1990 (NLEA), 21 U.S.C. § 343-1(a), a statute administered by the FDA. According to the Ninth Circuit, the statute also constitutes unmistakably clear congressional permission for California to engage in *economic* regulation through its milk pricing and pooling plans without regard to whether any aspect of those plans would otherwise violate the Commerce Clause. Petitioners contend, by contrast, that Section 144 does not broadly exempt California's pricing and pooling plans from *any* body of federal law, and does not exempt *any* body of California law from scrutiny under the Commerce Clause. Accord U.S. Br. 8-9 (filed Dec. 4, 2002).

The individual petitioners also contend that the 1997 amendments to California's Pooling Plan discriminate against them on the basis of out-of-state residency, in violation of the Privileges and Immunities Clause. The merits of the Privileges and Immunities Clause claim, like the merits of the Commerce

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[2] Section 144 provides in full:

> **§ 7254. Effect on fluid milk standards in State of California**
>
> Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding —
>
> (1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or
>
> (2) the labeling of such fluid milk products with regard to milk solids or solids not fat.

Clause challenge to the 1997 amendments by all petitioners, are not before this Court. The Ninth Circuit did not decide whether there is "substantial reason for the discrimination beyond the fact that they are citizens of other States," *Toomer* v. *Witsell*, 334 U.S. 385, 396 (1948), because it denied that any discrimination on the basis of citizenship had occurred. To reach that conclusion, the Ninth Circuit examined only the face of the 1997 amendments, which in explicit terms discriminate on the basis of where milk is produced rather than on the basis of the citizenship of those producing it. Despite *Chalker* v. *Birmingham & N.W. Ry.*, 249 U.S. 522 (1919), which condemns "laws which *in their practical operation* materially abridge or impair the equality of commercial privileges secured by the federal Constitution to citizens of the United States" (*id.* at 526-527 (emphasis added)), the Ninth Circuit refused to consider the individual petitioners' factual contention that milk production is so closely tied to residency that discrimination on the basis of the location of the dairy farm is in practical operation discrimination on the basis of the citizenship of the dairy farmer.[3]

Petitioners contend that the Ninth Circuit erred both in construing 7 U.S.C. § 7254 to foreclose any challenge under the Commerce Clause, and in construing the Privileges and Immunities Clause to disallow claims in the absence of *facial* citizenship discrimination without regard to the practical effect of a state law or regulation. Petitioners do not ask the Court to resolve the complex merits of their constitutional challenges to the 1997 amendments to California's Pooling Plan, merits

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[3] This factual contention was not developed below, as the Privileges and Immunities Clause claims were dismissed under Fed. R. Civ. P. 12(b)(6). See C.A. Excerpts of Record Tab 8. However, as petitioners pointed out in briefs to the courts below, the most recent Census of Agriculture reveals that 93% of reporting dairy farm operators reside on the farm they operate. USDA, 1997 CENSUS OF AGRICULTURE Table 51, http://www.nass.usda.gov/census.

issues that have never been fully developed below because of the lower courts' dismissal of petitioners' claims on threshold grounds. Rather, "if the Court were to * * * reverse on the Section 7254 question" and the question whether the Privileges and Immunity Clause applies at all, "it would be appropriate to remand the underlying Commerce Clause" and Privileges and Immunities Clause "question[s] for consideration by the lower courts in the first instance." U.S. Br. 17 (filed Dec. 4, 2002).

A. California's Milk Product Composition Regulation and Stabilization and Pooling Plans

Single-state economic regulation of milk has been difficult ever since this Court construed the Commerce Clause in *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), to forbid the States from setting minimum prices for milk purchased in interstate commerce. However, Congress authorized the U.S. Secretary of Agriculture to establish and maintain "orderly marketing conditions for agricultural commodities in interstate commerce." 7 U.S.C. § 602(1); see *Block* v. *Community Nutrition Inst.*, 467 U.S. at 346 ("The Act contemplates a cooperative venture among the Secretary, handlers, and producers the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them.").

Today, almost all of the 48 contiguous States are covered by the Federal Milk Marketing Order (FMMO) program. The major exception is California. Among other things, the federal program contains its own pricing and pooling mechanisms. See generally *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 189 n.1 (1994); *Block* v. *Community Nutrition Inst.*, 467 U.S. at 343.

California has been regulating fluid milk standards for beverage milk sold at retail since at least 1907. See *Ex parte Hoffman*, 155 Cal. 114, 116-117, 99 P. 517, 518 (1909). During the 1990s, certain California composition and labeling standards for packaged fluid milk were preempted by those administered by the FDA under the NLEA, 21 U.S.C. § 343-

1(a). See *Shamrock Farms Co.* v. *Veneman*, No. CIV-S-95-318, slip op. 3 (E.D. Cal. June 5, 1995) (Levi, J.). Section 144 of the 1996 Farm Bill – whatever other effects may be in dispute – gave California an exemption from the preemptive effect of the NLEA with regard to fluid milk fortification. Thus, California requires fluid milk processors to fortify beverage milk that is sold at retail with minimum levels of solids not fat (using non-fat dry milk or condensed milk) that exceed federal composition and labeling standards under the NLEA. Cal. Food & Agric. Code § 35784.

California, like USDA, also engages in economic regulation of raw milk. Since the 1930s, California has regulated processors (those who convert raw milk to finished dairy products such as beverage milk, sour cream, ice cream, cheese, and butter) by requiring that California processors pay dairy farmers minimum prices when purchasing raw milk. See, *e.g.*, Stabilization and Marketing Plan for Market Milk, As Amended, for the Northern California Marketing Area <http://www.cdfa.ca.gov/dairy/stabplans/ncastabplan.PDF>. Raw milk is classified according to the end product for which it is used. California's five Classes (1-3, 4a, and 4b) include Class 1, fluid/beverage milk, and Classes 4a and 4b, nonfat dry milk, butter, and hard cheese. See Calif. Food & Agric. Code §§ 61932-61935. A processor purchasing raw milk for conversion to fluid milk must pay the Class 1 price; a processor purchasing raw milk for conversion to hard cheese must pay the Class 4b price. Generally, the highest minimum prices apply to Class 1 milk and the lowest to Class 4a or 4b milk.

As in the federal program (see *West Lynn*, 512 U.S. at 189 n.1), California has since 1969 administered a revenue equalization pool to redistribute among dairy farmers revenue from the sale of milk at various classified prices. See JA 32-60 (1997 version of Pooling Plan); http://www.cdfa.ca.gov/mkt/mp/POOLPLAN_09-01.pdf (current version). Minimum price regulation – described above and carried out through the Stabil-

ization Plans – results in different prices for the same raw milk depending on whether it is used by the processor for Class 1, 2, 3, 4a, or 4b purposes.

To limit competition for and transaction costs associated with sales to the highest paying (generally Class 1) processors, California dairy farmers agreed (by rule and referendum) to pool their revenue and divide it up on a uniform or pro rata basis. The distribution is called the "blend price." There are two farm blend prices in California (called "quota" and "overbase") instead of a single blend price, as in the federal system. See CDFA, Marketing Services Division, Dairy Marketing Branch *Glossary of Dairy Marketing Terms* <http://www.cdfa.ca.gov/dairy/appendix.html>.

The mechanics of enforcing this basic pair of concepts – that processors pay the nonuniform prices depending on the Class or Classes of products they produce, but farmers receive the blend price – are somewhat intricate. In California, CDFA is the administrator of the revenue pool. Processors are simply required to serve as "conduits" of the redistributed revenue. In this capacity a Class 1 processor pays the applicable quota or overbase blend price to the dairy farmer. The amount paid directly to farmers is "credited" against the processor's total minimum Class 1 price obligation. This total is also called the "gross pool obligation." The processor pays the remainder of the minimum Class 1 price into the Pool. The Class 1 processor, by two checks, has therefore simply accounted for the full minimum price. A Class 4a or 4b processor similarly pays the blend price to the dairy farmer. Because the blend price is generally greater than the processor's Class 4 price obligation, the processor receives from the Pool reimbursement for the difference between the blend price and the (lower) minimum Class 4a or 4b price. The Class 4 processor has therefore also simply accounted for the minimum Class 4 milk price – its gross pool obligation – while farmers have received their pooled, blend price.

In practice, most processors do not exclusively produce one Class of products and must pay the gross pool obligation based on a weighted average of the various Class prices. The weighted average applied to a hundredweight sales unit of milk (*i.e.*, 100 pounds of milk) is referred to as the "plant blend price." For example, the plant blend price for a plant processing 50% Class 1 milk at $18 per hundredweight and 50% Class 2 at $15 would be $16.50. The "plant blend price," fundamentally a processor concept that results from pricing regulation, is not to be confused with the "blend price," fundamentally a producer (dairy farmer) concept that results from pooling regulation.

Before the 1997 Pooling Plan amendments, out-of-state dairy farmers (including petitioners) were the masters of their own economic destiny. Unlike their California counterparts, who through pooling were guaranteed the blend price and eligible to own "quota" without having to compete for the best purchasers, Arizona and Nevada farmers had both the opportunity and the burden to compete for the California business worth competing for, mainly the Class 1 sales. California did not pool and redistribute the difference between the sale price (plant blend price paid) and the blend price. Rather, California processors and out-of-state farmers engaged in something more closely resembling a free-market transaction, with the total price going entirely to the seller – the out-of-state farmer. See U.S. Br. 5-6 (filed Dec. 4, 2002) ("although a handler that principally produced fluid milk had to pay money into the pool for its raw milk purchases from California dairy farms, it did not have to pay money into the pool for its purchases from out-of-state farmers").

California farmers were protected by the Pool system from having to compete for sales generating the highest minimum price, while out-of-state farmers had no such protection from competition, nor did they receive the benefits of being able to own and transfer quota. As the CDFA Milk Pooling Branch Chief explained in testimony before Congress in 1995:

> Out-of-state dairy farmers may not own quota. *In compensation*, out-of-state dairy farmers shipping to an instate plant receive the plant blend price. Thus, it is possible for an out-of-state dairy farmer shipping to an instate fluid milk plant (Class 1 plant) to receive a higher price than an instate dairy farmer receiving the quota price.

Formulation of the 1995 Farm Bill (Dairy Title—Technical Considerations): Hearings Before the Subcomm. on Livestock, Dairy, and Poultry of the House Comm. on Agriculture, 104th Cong., 1st Sess. 347 n.13 (1995) (prepared statement of Glenn T. Gleason, Chief, Milk Pooling Branch, CDFA) (emphasis added); see also Pooling Plan § 104, JA 32; U.S. Br. 4 n.1 (filed Dec. 4, 2002).

After 30 years of staying out of the transactions between out-of-state dairy farmers and California processors, CDFA's economic regulatory arm in July 1997 implemented amendments to the California Pooling Plan that forced out-of-state dairy farmers to participate in the California Pool, but only as second-class citizens. As the Solicitor General has observed, "out-of-state dairy farmers, unlike California dairy farmers, are not guaranteed any minimum price for their raw milk (much less the quota price)." U.S. Br. 6 (filed Dec. 4, 2002); see also *id.* at 17. CDFA adopted the challenged amendments after repeated requests by California dairy farmer groups to address what was widely referred to as the "out-of-state milk problem." See C.A. E.R. Tab 11K at 2. Petitioners' challenges to the 1997 amendments are the subject of these lawsuits.

B. This Case

Petitioners are corporations and individuals who operate dairy farms in Nevada and Arizona. In two separate actions that are now consolidated, they challenged the constitutionality of the 1997 amendments to the California Pooling Plan. They contended that the Pooling Plan, and underlying provisions of the Milk Stabilization and Milk Pooling Acts, directly burden

and discriminate against out-of-state dairy farmers in violation of the Commerce Clause and the Privileges and Immunities Clause.

Without reaching the constitutional merits, the district court rejected those claims. In granting summary judgment for the State on the Commerce Clause claims, the court relied on *Shamrock Farms Co.* v. *Veneman*, 146 F.3d 1177 (9th Cir. 1998), cert. denied, 525 U.S. 1105 (1999), which the court understood as holding that 7 U.S.C. § 7254 "immunized California's milk pricing and pooling laws from Commerce Clause challenge." Pet. App. A19. The court dismissed the claim under the Privileges and Immunities Clause on the ground that "the pooling plan does not discriminate against nonresidents." Pet. App. A5; C.A. E.R. Tab 8 at 5.

The Ninth Circuit affirmed. Pet. App. A1-A15. The Ninth Circuit agreed with the district court that *Shamrock* controlled the Commerce Clause claim. Although *Shamrock* had addressed California's milk composition requirements for fluid milk and its fortification allowance for in-state handlers, not every pricing and pooling requirement for raw milk, the Ninth Circuit held that "*Shamrock* broadly refers to the pricing and pooling laws and finds them to be closely related to California's composition requirements and protected from Commerce Clause challenges." Pet. App. A7-A8. Relying (*id.* at A8) on legislative history cited in *Shamrock*, without any analysis of whether that legislative history had anything to do with economic regulation of raw milk, the court concluded that California's raw milk and fluid milk regulations are "closely related" and that it "follows that the 1997 amendments which directly affect raw milk, indirectly affect fluid milk." Pet. App. A10. The Ninth Circuit believed that that conclusion somehow meant that application of the Commerce Clause to California's raw milk Stabilization and Pooling Plans would somehow "preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or

continue to effect any law, regulation, or requirement regarding (1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or (2) the labeling of such fluid milk products with regard to milk solids or solids not fat." 7 U.S.C. § 7254.

The Ninth Circuit also affirmed the dismissal of the claims under the Privileges and Immunities Clause. The court dismissed the individual dairy owner petitioners' claims because "[t]he amendments do not, *on their face*, create classifications based on any individual's residency or citizenship." Pet. App. A14 (emphasis added). Analyzing only the face of the Pooling Plan, not its practical effect, the court observed that "the classifications the pooling plan amendments create are based on the location where milk is produced," not on "any individual's residency or citizenship." *Ibid.*[4]

SUMMARY OF ARGUMENT

Only an unmistakably clear statute will suffice to exempt state regulations from Commerce Clause scrutiny. The text of the statute is by far the best evidence of whether Congress has spoken with clarity. Ambiguous statements will not suffice.

Section 144 of the 1996 Farm Bill does not broadly protect California's economic regulation of raw milk from federal law, nor is the Commerce Clause part of the federal law from which Section 144 provides protection. The statute does *not*, as the Ninth Circuit claimed (Pet. App. A10), "appl[y] to 'any provision of law' that 'directly or indirectly' has an effect on fluid milk." It gives California permission, free from certain constraints of federal law, to use direct or indirect means to "establish or continue to effect" requirements regarding two specified subjects that are a small subset of the subjects that have to do with packaged fluid milk. It is not even remotely plausible to say that the *entire* range of things covered by California's pricing and pooling plans has anything to do with percentage and labeling of milk solids and solids not fat, let alone that every provision is necessary "to establish or continue to effect" fluid milk composition and labeling requirements. Indeed, Congress in this very same legislation demonstrated that it knows how to use the vocabulary of California pricing and pooling regulation and would not likely refer to that body of regulation through the language it used in Section 144.

Furthermore, Congress made no reference to the Commerce Clause. The "provision[s] of law" courts are not to "construe[]" to invalidate California's fluid milk composition standards are statutory. Both the use of the verb "construe" and the pairing of "this Act" with "any other provision of law" suggest that the *most* natural reading of the text is that it does not refer to the Constitution; the applicable clear-statement rule precludes construing ambiguous text as a Commerce Clause exemption.

Legislative history *cannot* supply the necessary clear statement. Even if it could, however, the legislative history of Section 144 would help respondents not one bit. From its origin as one item on the wish list of Congressman Bill Thomas, through the Conference Report and even subsequent floor statements, Section 144 was *never* described as having anything to do with the Commerce Clause and *always* described as a provision that would preclude the NLEA from preempting California's historical composition standards for fluid milk.

The Commerce Clause challenge itself is not before the Court but is a very serious one. Both the California Legislative Counsel and the U.S. Solicitor General have observed its seriousness. The 1997 amendments project California's legislation into surrounding States and do so to suppress or mitigate the consequences of competition between States.

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[4] The court also held that the corporate petitioners could not raise a Privileges and Immunities Clause claim. Pet. App. A13. Petitioners did not advance corporate claims in the court of appeals and do not challenge that aspect of the decision. See *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168, 178-179 (1869).

The Ninth Circuit also erred at the threshold of analysis of Privileges and Immunities Clause jurisprudence by holding that the individual petitioners' claims must fail because the discrimination effected by the milk pooling scheme is based on the location of the farm where the milk is produced, and not the residency or citizenship of the producer. In the relevant areas of its jurisprudence, this Court has emphasized substance, not form. In particular, *Chalker* v. *Birmingham & N.W. Ry.*, 249 U.S. 522 (1919), and *United Building & Construction Trades Council* v. *Mayor and Council*, 465 U.S. 208 (1984), construe the Privileges and Immunities Clause in ways that directly foreclose the Ninth Circuit's analysis.

ARGUMENT

I. SECTION 144 OF THE 1996 FARM BILL DOES NOT EXEMPT CALIFORNIA'S STABILIZATION AND POOLING PLANS FROM SCRUTINY UNDER THE COMMERCE CLAUSE

A. Only an Unmistakably Clear Statute Will Suffice to Exempt State Statutes or Regulations from Commerce Clause Scrutiny

"Congress, if it chooses, may * * * confer[] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980). "[F]or a state regulation to be removed from the reach of the dormant Commerce Clause," however, "congressional intent must be *unmistakably clear*." *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 91 (1984) (emphasis added); see also *Wyoming* v. *Oklahoma*, 502 U.S. 437, 458 (1992); *Maine* v. *Taylor*, 477 U.S. 131,139 (1986); *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 408 (1994) (O'Connor, J., concurring in the judgment). The Ninth Circuit itself has paid lip service to the need for "unmistakably clear" congressional intent. Judge Reinhardt's opinion for the Ninth Circuit in *Shamrock*, for example,

acknowledged that only an unmistakably clear congressional intent would suffice. 146 F.3d at 1180. In determining that Congress had indeed spoken with unmistakable clarity, however, not only did the Ninth Circuit err; the Ninth Circuit completely failed to analyze the clarity of the materials on which it relied to demonstrate a supposed congressional intent.

"The requirement that Congress affirmatively contemplate otherwise invalid state regulation is mandated by the policies underlying dormant Commerce Clause doctrine." *South-Central Timber*, 467 U.S. at 91-92. The rationale for the clear-statement rule in this area of the law is that, "when Congress acts, all segments of the country are represented, and there is significantly less danger that one State will be in a position to exploit others." *Id.* at 92. From that rationale, it necessarily follows that the text of the statute is the best evidence of whether congressional intent has been manifested with sufficient clarity; and that, if legislative history is to be examined at all, it must manifest a congressional decision that is both *collective* and *clear*. Statements of witnesses at a subcommittee hearing – on which the Ninth Circuit relied in both *Shamrock*, 146 F.3d at 1182, and the decision below, Pet. App. A8 – are particularly poor candidates to manifest clear, collective intent.

In numerous cases in various areas of the law, this Court has emphasized the stringency with which it will apply clear-statement rules. "In traditionally sensitive areas, * * * the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991) (internal quotation marks and citations omitted). Therefore "it must be *plain to anyone reading the Act* that it covers" the subject at issue in the litigation. *Id.* at 467 (emphasis added). It is not enough that it "could be broadly read." *Raygor* v. *Regents of University of Minnesota*, 534 U.S. 533, 542 (2002); see also *id.* at 544-545. "Evidence of

congressional intent must be both unequivocal and textual." *Dellmuth* v. *Muth*, 491 U.S. 223, 230 (1989).

Specific words may not be required, but an absence of ambiguity is. Affirmative statements, not inference, must be found. *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982). "[W]hen Congress has not 'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause, [courts] have no authority to rewrite the legislation based on mere speculation as to what Congress 'probably had in mind.'" *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982) (citation omitted).

Section 144 of the 1996 Farm Bill protects some body of California law against some body of federal law. In light of the applicable clear-statement rule, the statute must be examined both to ascertain whether the Stabilization and Pooling Plans are clearly part of the California law to be protected, and whether the Commerce Clause is clearly part of the federal body of law from which Section 144 protects. Neither proposition is true. As the Solicitor General correctly observed in his cert.-stage amicus brief, "Section 7254 does not contain any indication at all, much less an 'unmistakably clear' one, that Congress intended to immunize California's milk pricing and pooling laws from Commerce Clause scrutiny." U.S. Br. 10 (filed Dec. 4, 2002).

B. Section 144 of the 1996 Farm Bill Contains No Unmistakably Clear Indication – Indeed, No Indication at All – That Congress Intended to Immunize California's Pricing and Pooling Laws from Commerce Clause Scrutiny

1. The text of Section 144 refers to neither pricing and pooling laws nor the Commerce Clause

Section 144 of the 1996 Farm Bill, 7 U.S.C. § 7254, provides in full:

> **§ 7254. Effect on fluid milk standards in State of California**
>
> Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding —
>
> (1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or
>
> (2) the labeling of such fluid milk products with regard to milk solids or solids not fat.

The statute is obviously designed to provide some degree of protection from federal law for California's product composition and labeling requirements for packaged fluid milk. Petitioners respectfully submit, however, that it does not broadly protect California's economic regulation of raw milk from federal law, nor is the Commerce Clause part of the federal law from which Section 144 provides protection.

a. Section 144 does not broadly protect California's economic regulation of raw milk from federal law

In *Shamrock*, and again in the decision below, the Ninth Circuit interpreted the phrase "any other provision of law," from which specified California regulations are protected, to include the Commerce Clause. Even if that interpretation was right – and it was not right (see pp. 23-25, *infra*) – several further interpretive violations of the "clear statement" rule are required to conclude that Congress immunized *all* things California does with its pricing and pooling plans to impede interstate commerce. And those leaps are not sustainable as a matter of ordinary statutory interpretation, let alone under the clear-statement principle applicable to statutes said to abrogate the Commerce

Clause. See U.S. Br. 11 (filed Dec. 4, 2002) ("Section 7254, even if understood to provide a Commerce Clause immunity for some state laws, does not reach the laws at issue here.").

The Ninth Circuit at least understood that the Pooling Plan concerns *raw* milk, whereas the statute refers to regulation of *fluid* milk sold at retail. To bridge the gap between the statute's references to regulation of fluid milk sold at retail and its holding that regulation of raw milk is also protected, the Ninth Circuit engaged in a wholesale rewriting of the statutory text. In the court's view:

> Ponderosa and Hillside's argument is unpersuasive because § 144 applies to "any provision of law" that "directly or indirectly" *has an effect on fluid milk*. Raw milk and fluid milk are closely related. *It follows that the 1997 amendments which directly* ***affect*** *raw milk, indirectly* ***affect*** *fluid milk.*

Pet. App. A10 (emphasis added). But Section 144 simply does not apply to any provision of law that directly or indirectly has an effect on fluid milk. In statutory context, "directly or indirectly" modifies "establish or continue to effect." Thus, whatever the statute gives California permission to do, California may do "directly or indirectly." That is hardly the same thing as saying that California has been given permission to do anything and everything that directly or indirectly has any effect on fluid milk. Rather, California has been given permission, free from certain constraints of federal law, to "establish or continue to effect" requirements "*regarding*" two specified subjects that are a small subset of the subjects that have to do with fluid milk.

Suppose California had been given permission, "directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding soccer or football." Soccer and football are part of the universe of sports, just as the composition and labeling subjects identified in Section 144 are part of the universe of fluid milk regulation. The Ninth Circuit's logic

would require that the statute, ostensibly just about football and soccer, be construed as permission to engage in the regulation of all sports and indeed all exercise:

> Ponderosa's and Hillside's argument is unpersuasive because [the hypothesized statute] applies to "any provision of law" that "directly or indirectly" has an effect on [sports]. [Exercise] and [sports] are closely related. It follows that the 1997 amendments which directly affect [exercise], indirectly affect [sports].

The specification of two subjects that the protected requirements must "regard[]" would be rendered meaningless by this substitution of the general universe to which those two subjects belong (sports) for the two specified subjects themselves.

Not only did the Ninth Circuit read "directly or indirectly" to modify a phrase it does not modify, and substitute the broad universe of "fluid milk" for the two specified subjects within that universe, but also the Ninth Circuit introduced a concept – "has an effect on fluid milk" – that is to be found nowhere in the statute. Suppose – contrary to fact – that the statute did say "fluid milk" instead of specifying two *aspects* of fluid milk regulation that Congress wished to protect. Even so, it would read: "Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding fluid milk." Such a statute still would require that the protected "law, regulation, or requirement" be one "*regarding*" fluid milk. California would be given some leeway to "establish or continue to effect" such requirements by indirect means as well as direct ones, but a "law, regulation, or requirement regarding fluid milk" – not a law, regulation, or requirement that "has an effect on fluid milk" – would still have to be identified. Because the verb "effect" appears in the statute, the Ninth Circuit seems to have leaped to the conclusion that it was proper to rewrite the statute as if it used the noun "effect" in a different place in the

statute, or used the verb "affect" in a different place in the statute, but the concepts of "affecting" and "having an effect on" are wholly absent from the statute Congress actually wrote. Particularly in a context in which a "clear statement" principle applies, such loose construction of statutory text is indefensible.

The universe of state laws and regulations that were given some form of protection from federal preemption is specified in the statute. That universe consists of requirements "regarding (1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or (2) the labeling of such fluid milk products with regard to milk solids or solids not fat." On the statute's face, the protected requirements have to do with composition and labeling of fluid (*i.e.*, processed) milk, specifically with respect to the percentage of milk solids or solids not fat. It is a leap to get from those statutory terms to *any* of California's economic regulations, let alone California's dairy farmer pooling provisions for raw (*i.e.*, unprocessed) milk. See U.S. Br. 11 n.2 (filed Dec. 4, 2002).

One particular form of economic regulation that is part of California's stabilization plans is a so-called "fortification allowance" (*i.e.*, discounted minimum price) given to California processors in recognition of the fact that California requires higher fat and solids-not-fat content in fluid milk than does the federal government and that money must be spent to bring raw milk up to California standards. *E.g.*, Stabilization and Marketing Plan for Market Milk, As Amended, for the Northern California Marketing Area, § 303(B)-(E) <http://www.cdfa.ca.gov/dairy/stabplans/ncastabplan.PDF>. There is enough of a relationship between the fortification allowance, on the one hand, and the types of product composition and labeling requirements identified in Section 144, on the other, to create some arguable (though very thin) support for the Ninth Circuit's determination in *Shamrock* that the fortification allowance was necessary for California's fluid milk standards or labeling requirements. See 146 F.3d at 1182 (relying on counsel's supposed concession during oral argument that the fortification allowance was "adopted in order to assist milk producers [*sic*] in complying with the milk content provisions"). That holding may well be wrong, but is not before the Court in this case.[5]

The further leap that must be made to bring the entirety of California's pricing and pooling plans within the universe of state laws protected by Section 144, however, is utterly indefensible. Section 144 is exclusively about the percentage of, and labeling with respect to, milk solids and solids not fat, *not* pricing and pooling. It is designed to protect Cal. Food & Agric. Code § 35784 and related regulatory requirements administered by the Milk and Dairy Foods Control Branch of CDFA, not to protect the unmentioned Stabilization and Pooling Plans administered by other branches of CDFA. Nor is it even remotely plausible to say that the *entire* range of things covered by the pricing and pooling plans has anything to do with percentage and labeling of milk solids and solids not fat, let alone that every provision is necessary "to establish or continue to effect" fluid milk composition and labeling requirements – which is, after all, the statutory text that must make it "plain to anyone reading the Act" (*Gregory*, 501 U.S. at 467) that the pricing and pooling laws are exempted from the Commerce Clause.

Believing that it had already determined in *Shamrock* that *all* California pricing and pooling requirements are immunized from the Commerce Clause, the Ninth Circuit did not engage in

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[5] *Shamrock* was certainly wrongly decided, in any event, because the federal laws against which Section 144 protects do not include the Commerce Clause (see pp. 23-25, *infra*); and Shamrock's complaint in this regard was "that California processors receive a competitive advantage against out-of-state processors because California only gives the fortification allowance to in-state processors." 146 F.3d at 1179. Furthermore, California's fluid standards have been in effect since at least 1907, see *Ex parte Hoffman*, 155 Cal. at 116-117, 99 P. at 518, but pooling was not adopted until 1969 – proving that pooling is unnecessary to maintain fluid milk standards.

any analysis – other than the hopelessly confused passage quoted above – of the relationship between the economic regulations at issue in this case and the product composition and labeling subjects mentioned in Section 144. And it is revealing what respondents had to say on that subject in their brief in opposition to the certiorari petitions. Only on page 15 did respondents address that relationship (the brief in opposition is otherwise largely devoted to the Commerce Clause merits, which are not before the Court). All they could say was "[e]ach of the challenged provisions is interrelated to California's fluid milk standards" without saying *why* or *how* the economic regulations petitioners challenge are necessary "to establish or continue to effect" the product composition and labeling requirements for which Congress created some degree of protection. It is a truism that "really, universally, relations stop nowhere" (*New York State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins Co.*, 514 U.S. 645, 655 (1995)), so that one can with a straight face claim that almost anything is "interrelated" to almost anything, but the statute actually before the Court requires far more than interrelatedness. See also U.S. Br. 12 (filed Dec. 4, 2002). It requires that the challenged state regulation be related to the specified fluid milk standards in such a way that striking down the former under federal law would – so obviously as to satisfy the applicable clear-statement rule – prevent California from "establish[ing] or continu[ing] to effect" the latter. 7 U.S.C. § 7254. No one has come up with any plausible theory – let alone a clear statement – that even purports to explain why striking down California's 1997 pooling amendments might jeopardize its product composition standards for fluid milk.

Congress in this very same legislation demonstrated that it knows how to use the vocabulary of California pricing and pooling regulation and would not likely refer to that body of regulation through the language it used in Section 144. See U.S. Br. 11-12 (filed Dec. 4, 2002). In the immediately preceding Section 143, 7 U.S.C. § 7253 (JA 17-20), for example,

not only did Congress provide for California's voluntary entry into the FMMO system, but also it provided that "[t]he order covering California shall have the right to * * * recognize quota value." 7 U.S.C. § 7253(a)(2) (JA 17). The reference to "quota" in Section 143 is to a term that is unique to California's Pooling Act and Pooling Plan.[6] Likewise, Section 145, 7 U.S.C. § 7255 (JA 21-22) is devoted in its entirety to restrictions on allowable "manufacturing allowances" under state law. As CDFA's Glossary (see note 6, *supra*) indicates, this term is "also called make allowance" and is "[u]sed to describe factors used in establishing California Class 4a and 4b prices and federal Class III and IV prices." It is an important component of California's Stabilization (pricing) Plans. *E.g.*, Stabilization and Marketing Plan for Market Milk, As Amended, for the Northern California Marketing Area, § 300.0(D)(1), (D)(2), (E)(1)(a), (E)(1)(b) <http://www.cdfa.ca.gov/dairy/stabplans/ncastabplan.PDF>. Congress used precise terminology when it wanted to refer to aspects of the Stabilization and Pooling Plans; it did not speak of them through indirect and obscure references to California's product composition regulations.

b. Section 144 does not protect any body of California law from the Commerce Clause

Misconstruing the body of *state* law saved from federal preemption by Section 144 was not the Ninth Circuit's only error. The Ninth Circuit also misconstrued – in both the deci-

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[6] See generally CDFA, Marketing Services Division, Dairy Marketing Branch, *Glossary of Dairy Marketing Terms* <http://www.cdfa.ca.gov/dairy/appendix.html>. The glossary notes that "quota" is a California-specific term and defines it as follows: "Part of a two–tiered pricing system in California. Essentially, quota is an entitlement that allows a producer to receive a price for milk that is $1.70 per hundredweight higher than the overbase price. Originated with the inception of the milk pooling program in 1969."

sion below and *Shamrock* – the body of *federal* law *from* which the specified body of California law is exempted.

As the Solicitor General observed in his cert.-stage amicus brief (at 10-11 (emphasis in original)):

> The statutory text does not unambiguously indicate that Congress intended to exempt *any* of California's laws from the Commerce Clause. Section 7254 does not refer to the Commerce Clause specifically or to the Constitution more generally. Moreover, its directive that no provision of law "shall be construed" in a particular manner is more naturally read as referring only to non-constitutional sources of law, because Congress is not ordinarily assumed to have intended to constrain the Judiciary's authority to construe the Constitution. Cf. *City of Boerne* v. *Flores*, 521 U.S. 507, 535-536 (1997). * * * Section 7254 thus is best understood as protecting certain California laws against preemption only by "this Act" [*i.e.*, the [1996 Farm Bill]) and any other provisions of federal statutory or regulatory law.

To reach its contrary conclusion, the Ninth Circuit in *Shamrock* paid lip service to the applicable clear-statement principle, but chose a far more expansive interpretation of the statute than its natural meaning. Judge Reinhardt's opinion for the court mocked petitioners' interpretation of the statute as one that would have required the Ninth Circuit to "conclude that the Commerce Clause, or, for that matter, the Full Faith and Credit Clause, or the provision of the Twenty-Second Amendment to the Constitution that prohibits the election of any person to the Office of President more than twice, do not constitute 'provisions of law.'" 146 F.3d at 1181. But statutory interpretation requires a contextual search for *meaning*, not a one-phrase-at-a-time parsing. As the Solicitor General correctly argues, the use of a form of the verb "construe" in Section 144 is one powerful indication that Congress meant to exempt the specified California laws and regulations from

federal regulations and statutes, not the Constitution. Another powerful indication is that Congress referred to "this Act or any other provision of law," a pairing most naturally read to suggest that Congress had statutory law in mind.[7] Words are, after all, "known by the company [they] keep[]." *Sprietsma* v. *Mercury Marine*, 123 S. Ct. 518, 526 (2002) (quoting *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995)).

The applicable clear-statement rule forecloses any contrary argument. With more than one reasonable meaning (assuming that the *Shamrock* court's reading is reasonable at all), Section 144 is ambiguous. It would *not* "be plain to anyone reading the Act" that it constitutes Congress's consent to specified state requirements that might otherwise violate the Commerce Clause. *Gregory* v. *Ashcroft*, 501 U.S. at 467. "In the instances in which we have found such consent, Congress' intent and policy to sustain state legislation from attack under the Commerce Clause was expressly stated." *Sporhase*, 458 U.S. at 960 (internal quotation marks and citations omitted). There is no such express statement here.

2. The legislative history cannot provide the necessary unmistakably clear statement, and in any event does not support respondents at all

According to the Ninth Circuit in *Shamrock*, "the legislative history * * * demonstrates that Congress intended that the milk pricing and pooling scheme be included in the exemption as a means of effecting California's milk composition standards."

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[7] Congress often uses phrases such as "notwithstanding any other provision of law" in ways that make it absolutely obvious it is not attempting to provide an exemption from the Constitution. *E.g.*, 21 U.S.C. § 862b ("[n]otwithstanding any other provision of law, States shall not be prohibited by the Federal Government from testing welfare recipients for use of controlled substances"). Congress also refers often to "the Constitution and laws" of the United States. *E.g.*, 42 U.S.C. § 1983.

146 F.3d at 1182; see Pet. App. A8 (similar conclusion by panel below). No portion of the legislative history, however, supports the proposition that California's pricing and pooling regulations have been granted a blanket exemption from the Commerce Clause. Rather, "the context in which Section 7254 was enacted supports the conclusion that it was intended solely to protect California's fluid milk composition and labeling laws against preemption by federal statutes and regulations." U.S. Br. 13 (filed Dec. 4, 2002).

We respectfully submit that legislative history can *never* supply "unmistakably clear" evidence of congressional intent when such evidence is lacking from the text of the statute. That principle finds support in both this Court's cases and logic. With respect to a similar "clear statement" rule, this Court has stated that "[e]vidence of congressional intent must be both unequivocal *and textual*." *Dellmuth* v. *Muth*, 491 U.S. at 230 (emphasis added); see also *Sporhase*, 458 U.S. at 960. And the only thing that is before *all* of the 535 Members of Congress who vote on a piece of legislation and the President who signs it is the *text* of the statute, not its voluminous legislative history. If something is unclear on the face of the statute, any clearer statement in the legislative history will, at a minimum, raise doubts about whether that statement appears in legislative history rather than statutory text precisely because it could not receive the assent of a majority of each House and the signature of the President. The very failure to put the clear statement into the text of the statute precludes the conclusion that *Congress* – as opposed to some subset of its Members – has made its intent unmistakably clear. See *C&A Carbone*, 511 U.S. at 410 (O'Connor, J., concurring in the judgment) (citing *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992); *Dellmuth* v. *Muth*, 491 U.S. at 230).[8]

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[8] See also *Lane* v. *Peña*, 518 U.S. 187, 192 (1996) (federal sovereign immunity); *Seminole Tribe* v. *Florida*, 517 U.S. 44, 56 (1996) (Elev-

If, despite these points, legislative history can *ever* provide the requisite unmistakable clarity when such clarity is absent from the text, then one would expect the text and legislative history to have several characteristics. The text would presumably make it passably, but not unmistakably, clear that Congress intended to exempt the very state laws at issue from the Commerce Clause. The legislative history would presumably be closely tied to the statutory text in a way that removed ambiguity from the very phrases being construed. It would presumably come from a very authoritative source (such as a Conference Report or, at the very least, a particularly authoritative Committee Report from one House or the other). And it would surely make explicit reference to the Commerce Clause, or *at least* the Constitution, and make explicit reference to the state laws being exempted, or *at least* make unmistakably clear reference to a genus of state laws being exempted.

Nevertheless, the Ninth Circuit gave dispositive weight to legislative history with *none* of those characteristics. The Ninth Circuit relied on two witness statements in a field hearing conducted in California by four Members of a Subcommittee long before any version of the 1996 Farm Bill was drafted. Neither witness mentioned the Commerce Clause or the Constitution at all. Neither witness mentioned "pooling." The one witness who mentioned "pricing" did so as part of a wish list of things he hoped Congress would do, but Congress granted a different one of his wishes in Section 144.

Approximately a year before the 1996 Farm Bill became law, and before any version of the bill was drafted, the Subcommittee on Dairy, Livestock, and Poultry of the House Committee on Agriculture held five hearings in dairy-producing locations around the country. See *Formulation of the 1995 Farm Bill*

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enth Amendment); *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 204 (1991) (same); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 243 (1985) (same).

(Dairy Title): Hearings Before the Subcomm. on Dairy, Livestock, and Poultry of the House Comm. on Agriculture, 104th Cong., 1st Sess. (1995) (*1995 Field Hearings*). In essence, Members of the Subcommittee traveled around the country to receive the initial "wish lists" of each dairy-producing region.

The California dairy industry's representatives had their say in a hearing held April 20, 1995, in Tulare, California. *1995 Field Hearings* 425-599. Congressman Bill Thomas of California did not attend the hearing in person but submitted a short written statement. Because the Ninth Circuit relied on – and badly misconstrued – this legislative history, we reproduce it nearly in full. Congressman Thomas summed up California's wish list as follows:

> As most of you know, the California dairy industry has been very successful in recent years. A substantial part of that success is due to enormous growth in California's population. There are two other factors for the California dairy industry's success that I hope the Subcommittee will allow the State to preserve.
>
> First, the State of California has for over 30 years had a set of standards for fluid milk products which ensure a high quality product. These standards require addition of nonfat solids into low fat milk, making low fat milk taste like whole milk. Milk consumers also get more calcium and protein under these standards. The standards are strongly supported by consumers in California, by dairymen and by nutritionists interested in the health of children and women.
>
> Unfortunately, national nutritional labeling requirements may lead to the termination of California's system. These standards have come under assault recently by dairymen outside the state, who wish to ship lower standard, so-called "federal milk" into California. California's fluid milk standards are one area where a state really "knows

> best." The California fluid milk market is almost totally self-contained–only 1% of the state's total consumption comes from out-of-state sources. The standards are not a barrier to milk produced in other states as, until recently, all *packaged* milk entering the state conformed to California standards. In a case such as this, where a state has had a very successful program for several decades, and where any burden on outside interests is largely theoretical, I would hope the federal government would <u>not</u> override that system.
>
> In addition to all the nutrition and health reasons why California fluid milk standards should remain in place, there will be a very real impact on the federal deficit if the California standards are overridden. * * *
>
> Unless the law is amended soon, California's standards may be eliminated. To give the State the ability to preserve a system that has served Californians well, I have introduced H.R. 1298. This bill would exempt California's standards from the federal requirement. Although the bill is not before the House Agriculture Committee, I hope you would join me in supporting it.
>
> The California dairy industry has enjoyed great success for another reason: the pricing system for dairy products in California has been developed through a very flexible, market-oriented approach. Products are priced according to what the market dictates. California dairymen believe very strongly that this system must be retained. In fact, the Subcommittee may want to examine the California system, to see whether there are aspects of it which could serve as the basis for changes in the federal order system.
>
> I also want to say a word about California's "make allowance" for manufactured dairy products. When Congress sought to override the California "make allowance" in section 102 of the 1990 Farm Bill, it involved USDA and

dairymen in a morass. USDA recently suggested that section 102 should be rethought during development of the 1995 farm bill. In reconsidering the policy, I hope the Subcommittee will decide to allow California to retain its historic practice.

The advantages of allowing California to preserve its make allowance are clear. * * *

Id. at 435-436 (underlining in original; italics added).

Congressman Thomas thus sounded three themes: (1) prevent "the federal government" from "overrid[ing]" California product composition and labeling requirements pertaining to the addition of nonfat solids into low-fat fluid milk by "exempt[ing] California's standards from the federal requirement"; (2) "retain[]" California's pricing system in general; and (3) "allow[] California to preserve its make allowance" by repealing Section 102 of the 1990 Farm Bill. With respect to *none* of those themes did Congressman Thomas mention the Commerce Clause. With respect to themes (1) and (3), he had specific amendments to federal legislation in mind, but theme (2) – retain California's pre-1995 pricing system – was merely general.

Other witnesses echoed some of the same themes – also without mention of the Commerce Clause. For example, Jim Tillison, on behalf of the Alliance of Western Dairy Producers, advocated maintaining California's "higher fluid milk standards" by "exempt[ing] California standards from NLEA preemption, remov[ing] the preemption of higher State standards by minimum Federal standards, or rais[ing] national fluid milk standards to California levels." *1995 Field Hearings* at 458; see also *id.* at 481-482 (statement of Craig S. Alexander on behalf of the Dairy Institute of California) ("Federal Milk Solids Standards. * * * It was of concern to our members that federal preemption of the California standards took place under the Nutritional Labeling and Education Act of 1990 without consid-

eration of the longstanding tradition of our program."); *id.* at 517-518 (prepared statement of A.J. Yates, Deputy Secretary of CDFA).

The Subcommittee Chairman, Congressman Gunderson, stated sympathy for the witnesses' position on NLEA relief. *1995 Field Hearings* at 476. He expressed less expectation that Congress – when it got around to drafting a bill – would give California what it wanted with respect to pricing: "[Witnesses] suggested that * * * California should have its own state order, its own state pricing system, its own state standards, its own state make allowance, but yet you want to have access to a national price support program to a national market. * * * I am not sure God could pass that through the U.S. Congress." *Id.* at 477.

As of February 9, 1996, when the House Committee on Agriculture reported favorably on a version of what was to become the 1996 Farm Bill, the proposed solution to the NLEA problem was to amend the federal standards to be the same as California's for solids-not-fat and milk-fat percentages. See H.R. REP. NO. 104-462, at 68, 94 (1996), *reprinted in* 1996 USCCAN 611, 641, 668. The Committee made no mention of the Commerce Clause.

On the floor of the House on February 28, 1996, however, Congressman Solomon of New York introduced an amendment – which ultimately passed – that replaced the entire dairy title of the Committee-approved bill with a new Title II. Included in the amendment were a proposed Section 204, which is worded essentially identically to what ultimately became Section 144 of the enacted statute,[9] and a proposed Section 205 that would have

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[9] The Solomon amendment used the phrase "continue in effect," which got changed to "continue to effect" in the enacted Section 144, and had one fewer comma than the final version. The changing of the common statutory phrase "continue in effect" to the unusual phrase "continue to effect" appears to have been a scrivener's error, but nothing in this case turns on the difference between the two phrases.

repealed Section 102 of the 1990 Farm Bill, former 7 U.S.C. § 1446e-1. 142 CONG. REC. H1480 (Feb. 28, 1996). Explaining his reasons for preferring his proposed Section 204 to the Committee-approved bill, Congressman Solomon explained:

> Solomon-Dooley also does not add extra solids into milk. Think about that. You do not want extra solids in your milk. You do not want that mandated down your throat, unlike the Gunderson bill. We do allow California to keep its existing standards if they see fit to do so.

Id. at H1481.

Congressman Bill Thomas of California – who had set out California's wish list in 1995 – also stated on the floor of the House his understanding of what the Solomon amendment would do (142 CONG. REC. H1486 (Feb. 28, 1996)):

> [W]e wanted to fortify our milk. Up until recently, we did what we wanted to do and left the rest of the country alone.
>
> What has occurred over the last several years is that California cannot do what it wants to do anymore. Here is a Federal court order [*Shamrock Farms Co.* v. *Veneman*, No. CIV-S-95-318, slip op. 3 (E.D. Cal. June 5, 1995)] telling California that they cannot enforce their own milk solid standards.
>
> There is no guarantee in the committee bill that we can do what we want to do. There is a guarantee in the Solomon bill.

After the House passed a bill that contained Section 204 of the Solomon amendment and a revised version of Section 205, and the Senate passed a bill with no corresponding provisions, the conferees accepted the House provisions. They explained:

> *(38) Effect on fluid milk standards in the State of California*
>
> * * *

> The conference-adopted bill provides the State of California an exemption from the preemption provisions of any Federal law respecting standards of identity and labeling for fluid milk.
>
> The State of California has had a system for requiring fortified fluid milk since the early 1960's. * * * These standards apply to all fluid milk sold at retail or marketed in the State of California.
>
> The Managers intend for the State of California to be able to fully enforce and apply its fluid milk standards and their attendant labeling requirements to all fluid milk sold at retail or marketed in the State of California. For purposes of this section, the managers intend "fluid milk" means milk in final packaged form for beverage use. (Section 144)

H.R. CONF. REP. NO. 104-494, at 338-339 (1996), *reprinted in* 1996 USCCAN 683, 701-702.[10]

Thus, Congressman Thomas got two of the three items on the wish list he had set out at the very beginning of consideration of farm legislation in the 104th Congress. In Section 144, the federal government was barred from overriding California product composition and labeling requirements pertaining to the addition of nonfat solids into low-fat fluid milk. In Section 145, 7 U.S.C. § 7255, California received relief from Section 102 of

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[10] Even after the Conference Report, there was further debate about the Farm Bill on the floor of the House before passage. In urging his colleagues to vote for the Conference-approved bill, Congressman Gunderson observed: "Section 144 is offered in an attempt to exempt California from existing Federal standards for the solids not fact [*sic*] content in Class I (fluid) milk. Regrettably, this section is drafted in such a way that the State standards would become a barrier to interstate commerce in fluid milk and, as a result, will likely spawn years of additional lawsuits on this issue." 142 CONG. REC. H3153 (Mar. 28, 1996). He obviously did not believe that Congress had insulated anything from Commerce Clause scrutiny in Section 144.

the 1990 Farm Bill, former 7 U.S.C. § 1446e-1, which was repealed, although Section 145 itself placed new restrictions on States' allowable "manufacturing allowances" (make allowances). No section of the 1996 Farm Bill, however, enacted Congressman Thomas's general wish to "retain" California's pricing system.[11]

The tenor of the discussion of what ultimately became Section 144 throughout the legislative history *confirms* what is plain on the face of the statute. It is concerned with federal statutory preemption of a specific aspect of California's composition and labeling requirements for fluid milk, not with constitutional limitations on California's economic regulation of raw milk.

C. The Ninth Circuit's Misconstruction of Section 144 Insulates from Review a Serious Commerce Clause Challenge

The underlying constitutional question – whether CDFA's Stabilization and Pooling Plans as applied to out-of-state raw milk transactions beginning in 1997 violate the Commerce Clause – is not before this Court. Nonetheless, the Ninth Circuit's treatment of Section 144 insulates from review a serious violation of the Commerce Clause involving both a direct burden on interstate commerce and discrimination against non-California milk production.

Indeed, two neutral observers have indicated that the 1997 amendments present a serious Commerce Clause question. In particular, the California Legislative Counsel was asked by California state legislators to review the 1997 amendments. The

[11] Arguably, Section 143(a)(2) of the enacted Farm Bill, 7 U.S.C. § 7253(a)(2), JA 17, shows that Congress as a whole pushed in the *opposite* direction from Congressman Thomas's desire. That section invites California into the Federal Milk Marketing Order system – an invitation, though not a command, for California to *abandon* the very pricing system Congressman Thomas wanted to "retain."

Legislative Counsel concluded, and advised CDFA, that the amendments were protectionist in intent and effect and violated the Commerce Clause. App., *infra*, 3a-11a.[12] And, on invitation from this Court, the U.S. Solicitor General filed an amicus brief stating: "Although the United States does not take a position on the underlying constitutional question in this case, the California milk pricing and pooling laws, at a minimum, raise substantial questions under the Commerce Clause because of their facially disparate treatment of California dairy farmers and dairy farmers located outside the State." U.S. Br. 15-16 (filed Dec. 4, 2002).

Decades of this Court's Commerce Clause jurisprudence have struck down state dairy regulations aimed at insulating local dairy industries from interstate competition. In the seminal case of *Baldwin* v. *G.A.F. Seelig, Inc.*, this Court unanimously struck down a New York minimum price regulation as it applied to out-of-state raw milk because New York was attempting to project its minimum price regulation into other States. 294 U.S. 511, 524 (1935).

Baldwin involved a minimum price regulation that was adopted to ensure that New York dairy farmers would receive an adequate price for their milk. Under the regulation, New York milk processors were required to pay the minimum price when purchasing milk from New York farms. New York's power to enact that measure was not questioned. However, the corresponding regulation that was intended to prevent out-of-state milk from having a competitive advantage in light of the minimum price regulation was challenged. 294 U.S. at 519. This Court concluded that the regulation as it applied to out-of-state milk transactions (where title was taken in Vermont) directly burdened interstate commerce and violated the Commerce

[12] In California, opinions of the Legislative Counsel, though not binding, are entitled to great weight. *California Ass'n of Psychology Providers* v. *Rank*, 51 Cal. 3d 1, 17, 793 P.2d 2, 11, 270 Cal. Rptr. 796, 805 (1990).

Clause because "*commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another*, in the faith that augmentation of prices will lift up the level of economic welfare." *Id.* at 524 (emphasis added). The Court added that "[n]ice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis." *Id.* at 522.[13]

More recently, in *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186 (1994), this Court struck down a Massachusetts pricing order that bears a striking resemblance to the challenged pooling amendments. The Massachusetts pricing order required payment into a pool by all farmers, including out-of-state farmers, but distributed that money as a subsidy to in-state farmers only. As a result, the pool payment was neutralized vis-à-vis Massachusetts farmers, but nevertheless burdened out-of-state farmers. *Id.* at 199. In that case, this Court explained that "[t]he pricing order thus violates the cardinal principle that a State may not 'benefit in-state economic interests by burdening out-of-state competitors.'" *Ibid.*

With the adoption of the 1997 amendments, California has taken to projecting its regulation into surrounding States and has

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[13] The application of California's statutory minimum-price provisions – Cal. Food & Agric. Code §§ 62077-62078, JA 25 – to out-of-state dairy farmers is such a clear violation of the core holding of *Baldwin* that CDFA officials announced that they would not enforce those provisions against out-of-state dairy farmers, and the district court entered a preliminary injunction to ensure that they would not be so enforced. See C.A. E.R. Tab 7 at 5 & n.4. The Ninth Circuit's construction of Section 144, however, calls into question the applicability to California of even the most settled of Commerce Clause principles and precedents.

done so with the purpose of suppressing or mitigating the consequences of competition between States. Moreover, this action has resulted in disparate treatment that burdens out-of-state dairy farmers for the benefit of in-state dairy farmers.

Just as New York extended its minimum price regulation to out-of-state raw milk transactions in *Baldwin* in order to mitigate the consequences of competition from unregulated out-of-state raw milk, CDFA adopted the 1997 amendments for a similar protectionist purpose. This is shown by the circumstances that gave rise to the adoption of the challenged amendments, as well as by the express statements of CDFA officials.

The California Stabilization and Pooling Plans were conceived of during a time of geographic isolation and as a result were not designed to withstand the forces of interstate competition. For example, until the mid-1990s, California's relative geographic isolation gave the State the ability to avoid many of the ordinary forces of competition in a national market. ROBERT D. BOYNTON, MILK MARKETING IN CALIFORNIA: A DESCRIPTION OF THE STRUCTURE OF THE CALIFORNIA DAIRY INDUSTRY AND THE GOVERNMENT PROGRAMS UNDER WHICH IT OPERATES 1 (5th ed. 1995) ("The uniqueness of the California System developed largely because of the state's geographic isolation."). By setting Class 1 prices high (compared to fluid milk prices prevailing elsewhere in the region) and Class 4a and 4b prices low (compared to manufacturing milk prices prevailing elsewhere in the nation), California was able, through pooling, to bring about blend prices that were high enough to provide adequate income to dairy farmers to encourage growth in milk production, while also providing manufacturers of non-beverage (non-Class 1) dairy products the prospect of cheap prices and easy access to raw milk inputs and thus an incentive to locate manufacturing facilities in California. Geoffrey Vanden Heuvel,

Milk Producers Council Newsletter, Commentary on Class 1 Findings at 3-4 (March/April 1997), P.I. App. Tab 5 at 1-2.[14]

When technology and advances in transportation made it more economical to ship into California from out of state, the system of cross-subsidization began to invite competition that California dairy farmers did not welcome. High California Class 1 prices attracted out-of-state competition, especially in southern California. Because out-of-state milk did not participate in the California Pool, every time a California producer lost a Class 1 sale to an out-of-state dairy farmer, the California Pool lost revenue. P.I. App. Tab 5 at 2 ("The out-of-state milk decision is a step in the right direction, but time will tell if it is effective in stopping the leakage of Class 1 revenue out of the pool."). Thus, the California dairy industry recognized the need to insulate the Pool through other means.

Accordingly, the challenged amendments were conceived of and proposed by California farm groups that had been working with CDFA officials for months to resolve what they referred to as "the out-of-state milk problem." See C.A. E.R. Tab 11K at 2. In fact, an official designated as spokesperson for CDFA indicated to a member of the California Legislative Counsel's staff that the 1997 amendments were intended to keep out-of-state milk out of California. App., *infra*, 1a-2a.

In its summary of the hearing testimony, CDFA revealed the protectionist underpinnings of the 1997 amendments when it acknowledged that one of the objectives of the proponents of the 1997 amendments was to *make sure that California's Class 1 needs were supplied by California dairy farmers*. CDFA, Analysis of Pooling Hearing February 4, 1997, at 4, C.A. E.R. Tab 11R at 4. In fact, out-of-state milk was and to

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[14] "P.I. App." refers to the appendix to the motion of plaintiffs Hillside Dairy et al. for preliminary injunction and partial summary judgment, filed in the district court June 27, 1997.

this day is perceived by California dairy farmers as a serious threat to their blend prices because it causes "the leakage of Class 1 revenue out of [their] pool." Geoffrey Vanden Heuvel, Milk Producers Council Newsletter, Commentary on Class 1 Findings at 3-4 (March/April 1997), P.I. App. Tab 5 at 1-2; see also *Out-of-state milk flooding California*, DAIRY PROFIT WEEKLY, May 27, 2002, at 2.

The 1997 amendments are protectionist in effect as well as design. As in *Baldwin* v. *Seelig*, the 1997 Stabilization Plan and Pooling Plan amendments directly burden interstate raw milk transactions.

In particular, the 1997 Pooling Plan amendments imposed a direct burden on interstate milk transactions when, for the first time, out-of-state milk was pooled. Forced taking of out-of-state farmer revenue is effectuated through the establishment of a gross pool obligation (equal to the plant blend price, which is the total minimum price obligation of an individual plant) and a credit (equal to the lesser of the modified quota blend price or the plant blend price). Pooling Plan § 900(d), JA 47-48. The obligation owed directly to the California pool is the difference between the plant blend price and the credit.

Thus, under the 1997 amendments, when the plant blend price exceeds the quota blend price (as is usually the case), no longer may the out-of-state dairy farmer receive payment of the full value of his transaction – the plant blend price. Rather, because of the 1997 amendment, CDFA no longer permits the California processor to leave out-of-state milk out of its pool obligation calculation. Sturgeon Aff. ¶¶ 7-8, Plaintiffs' Joint Compilation of Affidavits in Support of Motion for Summary Judgment Tab 5 at 2 (filed in district court April 12, 1999) (Joint Compilation). Instead, out-of-state milk is now included, but the processor receives a credit against the minimum (plant blend) price of only the quota blend price (because it is the lesser credit) and must pay the difference between the plant blend price

and the quota blend price[15] into the Pool. This transaction closely resembles the credit and compensatory payment to a federal milk pool that this Court condemned as a trade barrier in *Lehigh Valley Coop.* v. *United States*, 370 U.S. 76, 84-85 (1962). As in *Lehigh*, all incentive for the processor to pay the out-of-state farmer more than the credited (quota blend) price is removed.

Indeed, out-of-state dairy farmers have been unable to charge prices in excess of the credit assigned by CDFA. Gruebele Aff., C.A. E.R. Tab 11M at 3; see also Sturgeon Aff. ¶¶ 14-15, Joint Compilation Tab 5 at 2. Thus, CDFA has imposed a tariff on out-of-state milk purchases equal to the difference between the gross pool obligation and the administratively determined credit. This tariff is directly borne by the out-of-state dairy farmer: the 1997 amendments had the direct effect of reducing, dollar for dollar, the amount paid to out-of-state producers by the amount processors were required to pay into the California pool. Gruebele Aff., C.A. E.R. Tab 11M at 3; see also Sturgeon Aff. ¶¶ 14-15, Joint Compilation Tab 5 at 2. This revenue reduction directly reduced the profitability of shipping milk from out of state into California and for some dairies simply made it no longer worthwhile to ship milk into California. For instance, Milky Way Farms, a northern Nevada dairy farm that had been shipping to Sacramento since the 1960s and was heavily dependent on milk sales into California, made the decision to go out of the dairy farming business in the face of lower returns. Witt Decl. ¶¶ 15-16, C.A. Supp. E.R. Tab 1 at 3. In other instances, dairies facing the prospect of diminishing

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[15] Although it does not alter the fact that this change directly burdens out-of-state milk transactions and causes discriminatory treatment of out-of-state milk, the credit is actually a modified quota price. It is approximately 3 cents higher than the quota price and is adjusted so that out-of-state milk is not required to fund the transportation allowance program. Gruebele Aff., C.A. E.R. Tab 11M at 4; Gruebele Supp. Decl. ¶ 23, C.A. E.R. Tab 11N at 9.

marginal returns reacted by increasing herd size. Olsen Decl. ¶ 8, C.A. Supp. E.R. Tab 2 at 2; Ligtenberg Decl. ¶ 18, C.A. Supp. E.R. Tab 3 at 3.

Moreover, by mandating the pooling of out-of-state milk without also granting to out-of-state farmers full access to the benefits of pooling, the 1997 amendments subjected out-of-state dairy farms to disparate treatment that benefited California farmers at the expense of out-of-state farmers in violation *of West Lynn Creamery* v. *Healy*, *supra*.

First, the challenged amendments required the out-of-state dairy to give a portion of its raw milk revenue to the California pool, which increased the overall size of the California pool, making more money available for distribution to California farmers, while decreasing the price received by the out-of-state farmer by the amount of the required pool contribution. Gruebele Aff., C.A. E.R. Tab 11M at 2-3; Milk Pool Referendum Post Card Ad, The Alliance of Western Milk Producers, P.I. App. Tab 27.

Second, although the out-of-state farmer may *in some circumstances* receive the quota price (*i.e.*, the highest blend price paid to California farmers owning quota), the out-of-state farmer can never receive the true "benefit" of quota, which includes the assurance of receiving the blend price without regard to competition or plant destination. Gruebele Supp. Decl. ¶ 25, C.A. E.R. Tab 11N at 9; Comparison of Milk Marketing Orders at 6, C.A. E.R. Tab 11B at 6. The asset value ($500 or more per hundredweight) is another benefit of quota ownership that out-of-state dairy farmers are denied. History of the California Milk Pooling Program at 8, C.A. E.R. Tab 11C at 8. On the free market, quota can be bought and sold for $500 or more per hundredweight. CDFA, California Dairy Review, Quota Transfer Summary at 2 (Feb. 2003) <http://www.cdfa.ca.gov/dairy/pubs/DairyRvw/index.html>.

Third, although out-of-state producers serve many of the markets in California that would otherwise entitle them to transportation allowances, because of their out-of-state status they cannot receive these transportation allowances. Pooling Plan Art. 9.2 <http://www.cdfa.ca.gov/mkt/mp/POOLPLAN_09-01.pdf>. This creates an artificial incentive for California processors to choose California milk over out-of-state milk. Effects of this type consistently have been held unconstitutional by this Court. See *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361 (1964); *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 576 (1997); *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525 (1949).

Petitioners, again, do not ask or expect this Court to resolve the merits of the constitutional issues raised in the courts below. The deep problems of protectionism and disparate treatment of out-of-state milk producers discussed above, however, demonstrate the magnitude of the matters that will go unscrutinized if the decision below is affirmed. This brief description of the constitutional problems also shows the utter lack of resemblance between the issues Congress addressed in the text and legislative history of Section 144 and the subject matter of this litigation. Economic protectionism of the sort petitioners challenge simply has nothing to do with California's desire and Congress's permission to keep California's historic compositional standards for fluid milk.

II. THE NINTH CIRCUIT'S SUMMARY TREATMENT OF THE PRIVILEGES AND IMMUNITIES CLAUSE CLAIMS ERRONEOUSLY DECLINED TO CONSIDER THE PRACTICAL EFFECT OF THE REGULATORY SCHEME ON OUT-OF-STATE DAIRY FARMERS

The Privileges and Immunities Clause was designed by the Framers to help preserve the economic union of the States by protecting individuals from discrimination in the pursuit of common callings within a State, or in the ownership or

disposition of privately held property, on the basis of out-of-state residency or citizenship. *Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274, 279-280 (1985); *United Building & Construction Trades Council* v. *Mayor and Council*, 465 U.S. 208, 219 (1984) ("Certainly, the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause.").

As it did in its disposition of Commerce Clause claims, the Ninth Circuit avoided the underlying merits of the claims under the Privileges and Immunities Clause raised by individual dairy farmers, petitioners Darrel and Diane Kuiper of Buckeye, Arizona. As in its approach to the Commerce Clause claims, the Ninth Circuit erred at the threshold of analysis of Privileges and Immunities Clause jurisprudence by circumventing long-established constitutional doctrine.

The Ninth Circuit's analysis of the individual dairy farmers' claims under the Privileges and Immunities Clause, U.S. CONST. Art. IV, § 2, cl. 1, went no further than an examination of the classifications made on the face of California's Milk Pooling Act, Cal. Food & Agric. Code §§ 62700-62756 (JA 25-31), and the regulations under that Act, *i.e.*, the Pooling Plan (JA 32-60). Because the alleged discrimination effected by the milk pooling scheme is based on the location of the farm where milk is produced,[16] and not the residency or

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[16] Discrimination against out-of-state milk farms, as alleged in Ponderosa's complaint and apparent on the face of state pooling laws, is illustrated by the following: (1) only California milk producers are eligible to vote in referenda to approve or disapprove state pooling plans; (2) California milk "quota" is a valuable property interest that only California milk producers are eligible to acquire, hold, transfer, and devise; (3) only California producers were awarded "quota" by the State of California, and only California producers are eligible to receive additional state-established quota, as it becomes available; (4) a California producer is guaranteed the same revenue-pooled price for milk sold to all California plants, regardless of the value of the

citizenship of the producer, the court rejected the individual dairy owners' privileges and immunities claim. Pet App A14.

The Ninth Circuit cited no decision of this Court for its conclusion that only facial discrimination on the basis of residency or citizenship is forbidden by the Privileges and Immunities Clause. This is not surprising, because the Ninth Circuit's approach of examining only the form of the legislation, and not its substance or practical effect, is contrary to this Court's precedent respecting the enforcement of constitutional rights generally and the Privileges and Immunities Clause in particular. In *Gregg Dyeing Co.* v. *Query*, 286 U.S. 472, 476 (1932), the Court speaking through Chief Justice Hughes emphasized that it is the substance of state laws that must be examined in determining their conformity to the strictures imposed by the United States Constitution:

> In maintaining rights asserted under the Federal Constitution, the decision of this Court is not dependent upon the form of a taxing scheme, or upon the characterization of it by the state court. We regard the substance rather than the form, and the controlling test is found in the operation and effect of the statute as applied and enforced by the state.

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milk to the plant under the state's classified pricing plan, while out-of-state producers bear the risk of price volatility between classes of use, and have fewer marketing opportunities to California's many dairy product manufacturing plants; (5) California milk producers are eligible to receive subsidies for the cost of transporting milk to a fluid milk processing plant, while out-of-state producers serving the same plant are never eligible for transportation allowances; (6) out-of-state producers are the only group who are unable to participate fully in the benefits of the state milk pool, but whose revenues are nonetheless taken for contribution to the revenue pool, thus subsidizing the income of their California competitors.

Discrimination is a "practical conception," and a court "must deal in this matter, as in others, with substantial distinctions and real injuries." *Gregg Dyeing*, 286 U.S. at 481; accord *Associated Indus.* v. *Lohman*, 511 U.S. 641, 654 (1994); see also *American Oil Co.* v. *Neill*, 380 U.S. 451, 455 (1965) ("When passing on the constitutionality of a state taxing scheme it is firmly established that this Court concerns itself with the practical operation of the tax, that is, substance rather than form."). The rights of citizens established under the Constitution, obviously, cannot be made subservient to clever drafting or legislative formalism. Discrimination is discrimination, whether "forthright or ingenious," direct or indirect. *West Lynn Creamery*, 512 U.S. at 201-202.

As in Commerce Clause cases, this Court's application of the Privileges and Immunities Clause has consistently involved an examination of the practical effects of state laws and regulations when a State's discrimination against out-of-state residents is not expressed on the face of those laws. In *Chalker* v. *Birmingham & N.W. Ry.*, 249 U.S. 522 (1919), a Tennessee privilege tax on railroad construction companies was struck down as discriminatory against nonresidents even though the discrimination was not based on residency or citizenship *per se*, but was based on whether a company had its principal office within Tennessee. Rejecting the conclusion of the state court that there was no discrimination on the basis of residency because the higher tax depended on the location of the company's principal office, this Court wrote:

> As the chief office of an individual is commonly in the state of which he is a citizen, Tennessee citizens engaged in constructing railroads in that state will ordinarily have their chief offices therein, while citizens of other states so engaged will not. Practically, therefore, the statute under consideration would produce discrimination against citizens of other states by imposing higher charges against them than citizens of Tennessee are required to pay. We

> can find no adequate basis for taxing individuals according to the location of their chief offices—the classification, we think, is arbitrary and unreasonable.

Id. at 527. *Chalker* establishes that it is the practical effect of a state law, and whether in practice it produces discrimination against nonresidents, that determines whether the law violates the Privileges and Immunities Clause.

Other cases since *Chalker* confirm that substance, not form, guides the analysis under the Privileges and Immunities Clause. In *Austin* v. *New Hampshire*, 420 U.S. 656 (1975), a law taxing the income of nonresidents working in New Hampshire was held to violate the Privileges and Immunities Clause because its burden fell disproportionately on nonresidents – in-state residents' income was not taxed. The Court reviewed the decisions in *Shaffer* v. *Carter*, 252 U.S. 37 (1920), and *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920), which also determined the validity of state income tax schemes under the Privileges and Immunities Clause, and noted that those cases put aside "'theoretical distinctions'" and looked to "'the practical effect and operation'" of the tax scheme at issue. Justice Marshall wrote for the Court in *Austin* that the New York scheme at issue in *Travis* "could not be sustained when its actual effect was considered" by the Court. *Austin*, 420 U.S. at 664. In *Shaffer*, 252 U.S. at 55, the Court held that "where the question is whether a state taxing law contravenes rights secured by [the federal Constitution], the decision must depend not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed."

Contrary to the Ninth Circuit's ruling here, this Court has "never read the [Privileges and Immunities] Clause so literally as to apply it only to distinctions based on state citizenship." *United Building & Construction Trades Council* v. *Mayor and Council*, 465 U.S. at 216. *Chalker* and the other authorities just cited examine the effect of state laws and regulations and

not merely the words used by the lawmaking body. These cases warn against allowing States to evade the limitations of the Privileges and Immunities Clause simply by drafting laws in ways that avoid facial distinctions on the basis of residency or citizenship. The cases have rejected a "formalistic construction" of the Clause under which a law "would be immune from scrutiny * * * simply because it was not *phrased* in terms of state citizenship or residency"; such a construction "would effectively write the Clause out of the Constitution." *United Building*, 465 U.S. at 217 n.9 (emphasis added).[17]

Practical effect also is the test for compliance with restrictions on state regulation of commerce under the Commerce Clause, which has in common with the Privileges and Immunities Clause the purpose of promoting interstate harmony and creating a national economic union. *Supreme Court of New Hampshire* v. *Piper*, 470 U.S. at 279-280. *In Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 (1951), this Court held invalid an ordinance requiring that milk sold within a city have been pasteurized within a five-mile radius of the city center, explaining as follows:

> [T]his regulation, like the provision invalidated in *Baldwin* v. *Seelig, Inc.*, [294 U.S. 511 (1935)], in practical effect

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[17] In *United Building*, a municipal ordinance of the City of Camden required that at least 40% of the employees of contractors working on city construction projects be Camden residents. The Supreme Court of New Jersey rejected a Privileges and Immunities Clause claim on the ground that the ordinance had identical effects on out-of-state citizens and New Jersey citizens not residing in Camden. In an opinion by then-Justice Rehnquist, this Court reversed by a 8-1 vote, concluding (465 U.S. at 217-218) that "Camden's ordinance is not immune from constitutional review at the behest of out-of-state residents merely because some in-state residents are similarly disadvantaged." As would be appropriate in the present case, the Court "remand[ed] the case for a determination of the validity of the ordinance under the appropriate constitutional standard." *Id.* at 210.

> excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois. * * * In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce.

That the ordinance also discriminated against Wisconsin producers did not mitigate the fact that the practical effect of the ordinance was to discriminate against interstate commerce. Thus, a determination that a state law does not discriminate on its face and purports to regulate even-handedly does not end the question of what level of Commerce Clause scrutiny should apply. "When a statute discriminates 'in practical effect' against interstate commerce, the fact that it purports to apply equally to citizens of all states does not save it." *Government Suppliers Consolidating Services, Inc.* v. *Bayh*, 975 F.2d 1267, 1278 (7th Cir. 1992) (citing *Brimmer* v. *Rebman*, 138 U.S. 78 (1891)), cert. denied, 506 U.S. 1053 (1993).

The practical effect of laws and regulations must guide the determination of whether those laws contravene the purpose of the Privileges and Immunities Clause to "'place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.'" *Hicklin* v. *Orbeck*, 437 U.S. 518, 524 (1978) (quoting *Paul* v. *Virginia*, 75 U.S. (8 Wall.) at 180). Although the lower courts did not reach the merits, it cannot be doubted that the practical effect and intent of California's Milk Pooling Act and implementing regulations is to discriminate between milk producers who do not reside in California and those who do, and the distinctions thus drawn should be scrutinized on the merits.

Data and experience indicate that the vast majority of persons engaged in the production of milk reside on the farms producing the milk. See note 3, *supra*. By discriminating on the basis of the location of the farm where milk is produced, and favoring milk produced on in-state farms, the California

plans have the natural effect of discriminating against producers because they do not reside in California. Unless California can somehow justify the differential treatment on remand, this violates a fundamental guarantee of the Privileges and Immunities Clause. "[I]t was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." *Toomer* v. *Witsell*, 334 U.S. at 396.

The Ninth Circuit's reliance on the distinctions made on the face of a state law or regulation allows the Clause to be avoided by exalting form over substance. That approach is contrary to the teachings of this Court and invites States of the Ninth Circuit to craft discrimination against non-residents by ingenious and indirect means. The judgment on the individual petitioners' Privileges and Immunities Clause claim should be reversed and the case remanded for consideration of that claim.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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FEBRUARY 2003

APPENDIX

DECLARATION OF FRANCES S. DORBIN,
PRINCIPAL DEPUTY LEGISLATIVE COUNSEL

[reprinted from Appellants' Supplemental Excerpts of Record, filed in the Ninth Circuit April 10, 2000]

I, Frances S. Dorbin, declare upon personal knowledge as follows:

1. I am employed as a Principal Deputy Legislative Counsel in the Office of Legislative Counsel.

2. The Office of Legislative Counsel is a nonpartisan office of legal advisors to, among others, the California Assembly and the California Senate, which assists in writing proposed legislation, provides analysis of legislation, and provides opinions concerning, among other things, California laws and regulatory activities.

3. During or about early November 1996, I was assigned responsibility to research and prepare a response to a request from Assembly Member John Burton for a written opinion concerning the constitutionality of proposed regulatory amendments to the California Milk Pooling Plan.

4. In the course of my duties relating to the opinion assignment, I contacted by telephone the Milk Pooling Branch of the California Department of Food and Agriculture to solicit information on the nature and purpose of the proposed amendments.

5. I was put in telephone contact with a pooling branch employee who identified himself as Mr. John Lee.

6. Mr. Lee told me that he was aware of and familiar with the pooling plan proposals to change regulatory treatment

of out-of-state milk. He told me that the proposals were intended to "keep those guys out." From the context of our conversation, I understood the comment to mean keeping out-of-state milk producers out of California.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 7th day of April, 1999.

/s/ Frances S. Dorbin

Frances S. Dorbin

Legislative Counsel of California

BION M. GREGORY

Sacramento, California
June 19, 1997

[reprinted from appendix to memorandum by plaintiffs Hillside Dairy, Inc., et al. in support of motion for preliminary injunction, filed in the district court June 27, 1997]

Honorable Charles M. Calderon
313 State Capitol

Milk Pooling - #12484

Dear Senator Calderon:

QUESTION

Would the amendments that are proposed to be made to the Pooling Plan For Market Milk that would restrict the price that out-of-state producers of milk could receive for that product to no more or less than the price received by in-state producers for market milk, if adopted, violate the Commerce Clause of the United States Constitution?

OPINION

The amendments that are proposed to be made to the Pooling Plan For Market Milk that would restrict the price that out-of-state producers of milk could receive for that product to no more or less than the price received by in-state producers for

market milk, if adopted, would violate the Commerce Clause of the United States Constitution.

ANALYSIS

Pursuant to the provisions governing the stabilization and marketing of market milk (Ch. 2 (commencing with Sec. 61801), Pt. 3, Div. 21, F.& A.C.[1]), the Secretary of Food and Agriculture (hereafter the secretary) is authorized to formulate stabilization and marketing plans for market milk (Sec. 61993). For the purposes of stabilization and market plans, market milk is classified as class 1, class 2, class 3, class 4a, and class 4b (see Art. 5 (commencing with Sec. 61931), Ch. 2, Pt. 3, Div. 21). The stabilization and marketing plans are required to contain provisions whereby the secretary establishes minimum prices to be paid by handlers to producers for market milk in the various classes (Sec. 62062). Prior to 1967, producers competed fiercely to supply bottling plants with class 1 milk, because class 1 milk commands the highest price (see Senate Floor Analyses, S.B. 688, June 8, 1993).

In 1967, the Legislature enacted the Gonsalves Milk Pooling Act (Ch. 3 (commencing with Sec. 62700), Pt. 3, Div. 21; (hereafter Chapter 3)), which contains a comprehensive scheme for milk pooling. Pursuant to Chapter 3, the secretary is authorized to develop a pooling plan (Sec. 62704) under which each producer is assigned a pool quota (subd. (d), Sec. 62707). A producer's quota determines the amount of class 1 milk the producer can sell to handlers within the pooling system. Milk sold in excess of quota receives the lowest base price, namely, that price for milk destined for class 4b products (Sec. 62711).

The current pooling plan only applies to producers who produce market milk in California (Sec. 104, Pooling Plan for

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[1] All section references are to the Food and Agricultural Code, unless otherwise specified.

Market Milk, as amended, effective April 1, 1997[2]). Producers who produce market milk outside of California and ship that milk into this state currently receive the plant blend price for that milk (see testimony of Glen Gleason, Chief, Milk Pooling Branch, Department of Food and Agriculture, before the Subcommittee on Livestock, Dairy and Poultry, United States House of Representatives, May 23, 1995).

Amendments have been proposed to the current pooling plan by referendum (hereafter the amendments) that would change the way certain milk is accounted for in the pool (Milk Pooling Branch, Pooling Plan for Market Milk, Explanation of Referendum). In particular, the proposed amendments would create a new category of milk known as "other source milk."[3] If the referendum is adopted, other source milk will never receive a pool credit greater than the monthly quota price or less than the nonquota price, adjusted by the pool price modification rate (Explanation of Referendum Ballots Mailed March 31, 1997). Thus, the amendments would set both a minimum and maximum price that a producer of other source milk could receive from a handler. In particular, under the proposed amendments, other source milk would receive the lower of the receiving plant's inplant usage credit for the month or the

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[2] All further references to the Pooling Plan for Market Milk are to that plan as amended, effective April 1, 1997.

[3] "Other source milk" is not currently defined in the Pooling Plan for Market Milk and it was not included in the referendum materials forwarded to us by the Milk Pooling Branch of the Department of Food and Agriculture. Kelly Jensen of your staff obtained additional materials from the Milk Pooling Branch that include a definition of "other source milk." According to that material, "other source milk" is "any market milk, skim or cream from a dairy ranch or milk plant not defined in this [plan]." Bob Horton of the Milk Pooling Branch informed Mr. Jensen that this definition is intended to apply to milk produced out of state.

announced monthly quota price plus the pool price modification rate (proposed subd. (d) (1), Sec. 900, the amendments). The amendments would also establish a minimum price for other source milk based on the current month's overbase fat price for the milk fat component and the current month's overbase solids not fat price plus the pool price modification rate (proposed subd. (d) (2), Sec. 900, the amendments).

Consequently, the net effect of these changes would be to restrict the price that an out-of-state producer may receive for market milk sold in this state to no greater or less than the price that an in-state producer receives for that product.

In that regard, however, the pooling plan also establishes a system of transportation allowances and credits for which the producers are eligible (see Article 9.2 (commencing with Section 920), Pooling Plan for Market Milk). The purpose of those allowances and credits is to provide an incentive for producers to make milk available to bottling plants (California Department of Food and Agriculture, Milk Pooling Branch, History of the Milk Pooling Program, undated, p. 5). These rates are calculated on the constructive miles from the dairy farm to the location of the plant of first receipt and apply to all pool milk (Sec. 921.2, Pooling Plan for Market Milk). The rates vary, depending on the location of the plant, and the distance the milk is shipped. For example, milk transported over 199 miles to plants located in the San Francisco bay area receiving area, which consists of the Counties of Alameda, Contra Costa, Santa Clara, Santa Cruz, San Francisco, and San Mateo, receives an allowance at the rate of $0.30 per hundred pounds of milk (para. (1), subd. (a), Sec. 921.2, Pooling Plan for Market Milk). On the other hand, milk transported 74 or fewer miles from the Counties of Fresno, Kern, Kings, and Tulare to plants located in the southern California receiving area, which consists of the Counties of Los Angeles, Orange, and Ventura, receives no allowance (para. (2), subd. (e), Sec. 921.1, Pooling Plan for Market Milk).

Under the amendments, producers of other source milk would not be eligible for the transportation allowances and credits, but the price they receive would be subject to the pool price modification rate. The pool price modification rate is an average rate calculated for each pool month by dividing the total value of the plant-to-plant transportation adjustments plus the total value for transportation allowances by the total pounds of solids not fat for receipts from producers and for other source milk (proposed Sec. 132, the amendments).

Thus, in summary, the amendments would restrict the price that an out-of-state producer may receive for market milk sold in this state to no greater than the price that an in-state producer receives for that product, as adjusted by an average amount for transportation costs. The amendments would also set a maximum price that an out-of-state producer may receive for market milk sold in this state.

The Commerce Clause of the United States Constitution grants to Congress the power "[t]o regulate Commerce with foreign nations, and among the several States ..." (Cl. 3, Sec. 8, Art. I, U.S. Const.), but places no express limits on the power of the states to regulate that commerce. "Nevertheless, the United States Supreme Court has repeatedly held for over a century that the commerce clause also limits the states' power to regulate both domestic interstate and foreign commerce, whether or not Congress has acted (citations omitted)" (Pacific Merchant Shipping Assn. v. Voss, 12 Cal. 4th 503, 514, cert. den. sub nom. Veneman v. Pacific Merchant Shipping Assn., 134 L. Ed. 2d 951.) As a consequence, any state statute or regulation that impacts domestic interstate or foreign commerce is subject to judicial scrutiny under the commerce clause unless the statute or regulation has been preempted, or unless explicitly authorized, by an act of Congress (Ibid.). The commerce clause's implicit, self-executing restriction on the states' power to regulate domestic interstate and foreign commerce is commonly referred to as the "negative" or "dormant" commerce clause

(Barclays Bank v. Franchise Tax Bd. of California, 129 L. Ed. 2d 244, 257 fn. 9).

In analyzing any law subject to scrutiny under the negative commerce clause, the threshold inquiry is whether the law "'regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce.'" (Pacific Merchant Shipping Assn. v. Voss, supra, at pp. 513-514). In the context of a challenge to a statute on the basis of the commerce clause, "'discrimination' simply means differential treatment of in-state and out-of-state interests that benefits the former and burdens the latter [citation omitted]. Such discrimination may take any of three forms: first, the state statute may facially discriminate against interstate or foreign commerce; second, it may be facially neutral but have a discriminatory purpose; third, it may be facially neutral but have a discriminatory effect (citation omitted)" (Id., at p. 514). The party challenging the law's validity has the burden of showing discrimination (Ibid.).

The second step of the analytical process is the application of the appropriate level of scrutiny. If the state measure is discriminatory, it is subjected to the "strictest scrutiny," and the burden then passes to the state to justify the measure both in terms of the local benefits flowing from the statute and the unavailability of a nondiscriminatory alternative adequate to preserve the local interests at stake (SDDS, Inc. v. State of S.D. (8th Cir.), 47 F. 3d 263, 268, 271). If "other legislative objectives are credibly advanced and there is not patent discrimination against interstate trade," the measure is subjected to a more flexible balancing test, and will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits (Pike v. Bruce Church, 25 L. Ed. 2d 174, 178).

In that connection, the United States Supreme Court has struck down numerous attempts by states to reserve the state's market for dairy products for its local dairy farmers. In Baldwin

v. Seelig, 79 L. Ed. 1032, for example, New York law prohibited the sale in New York of milk obtained by a distributor from other states unless the distributor had paid a price that would be lawful under New York price regulations. The Supreme Court struck down this provision as an impermissible burden on interstate commerce. After observing that the New York law was aimed at keeping "the system unimpaired by competition from afar" (Id., at p. 1036), the court noted:

> "Accepting those postulates [that New York could not directly outlaw the importation of milk from Vermont purchased at below New York prices], New York [nevertheless] asserts her power to outlaw milk so introduced by prohibiting its sale thereafter if the price that has been paid for it to the farmers in Vermont is less than would be owing in like circumstances for farmers in New York. . . . Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported." (Id., at p. 1037.)

The court went on to state:

> "Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. . . . We are reminded ... that a chief occasion of the commerce clauses was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation' (citations omitted). If New York in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce

between the states to the power of the nation." (Baldwin v. Seelig, supra, at p. 1038.)

In the subsequent case of Polar Ice Cream & C. Co. v. Andrews, 11 L. Ed. 2d 389, the United States Supreme Court invalidated Florida statutes and the regulations adopted pursuant to those statutes that required a Florida milk distributor to accept its total supply of class 1 milk at a fixed price from designated milk producers in its marketing area and that permitted the distributor to turn to out-of-state sources only after exhausting the supply offered by local producers. The court stated:

> "Florida has no power 'to prohibit the introduction within her territory of milk of wholesome quality acquired [in another State], whether at high prices or at low ones,' (citation omitted); the State may not, in the sole interest of protecting the economic welfare of its dairy farmers, insulate the Florida milk industry from competition from other States." (Polar Ice Cream & C. Co. v. Andrews, supra, at p. 399.)

We think that the courts would conclude that the proposed amendments to the pooling plan impermissibly burden interstate commerce and, therefore, are violative of the Commerce Clause of the United States Constitution in two respects. First, to the extent that the amendments set a maximum price that an out-of-state producer may receive for market milk sold in this state, but would not provide for the same transportation allowances and credits an in-state producer receives for that product, the amendments, on their face, are patently discriminatory against out-of-state producers. Secondly, to the extent that the amendments set a minimum price that an out-of-state producer must receive for market milk sold in this state, the amendments are analogous to those provisions of the New York Milk Control Act found by the United States Supreme Court to violate the Commerce Clause of the United States Constitution in Baldwin v. Seelig, supra.

Therefore, it is our opinion that the amendments that are proposed to be made to the Pooling Plan for Market Milk that would restrict the price that out-of-state producers of milk could receive for that product to no more or less than the price received by in-state producers for market milk, if adopted, would violate the Commerce Clause of the United States Constitution.

Very truly yours,

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Legislative Counsel

By /s/ Frances S. Dorbin

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FSD:lmd

[A similar letter dated December 5, 1996, also appears in the appendix to the preliminary injunction memorandum but has not been reprinted here. A similar letter dated November 18, 1996, was also prepared by the Legislative Counsel but was not submitted to the courts below.]